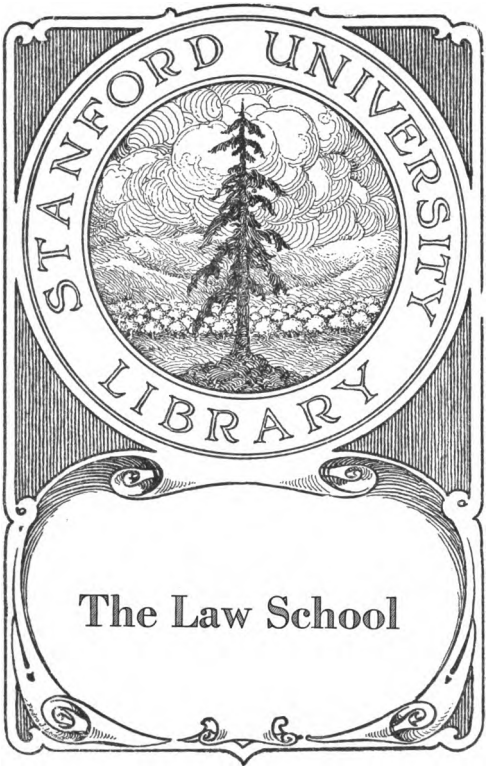
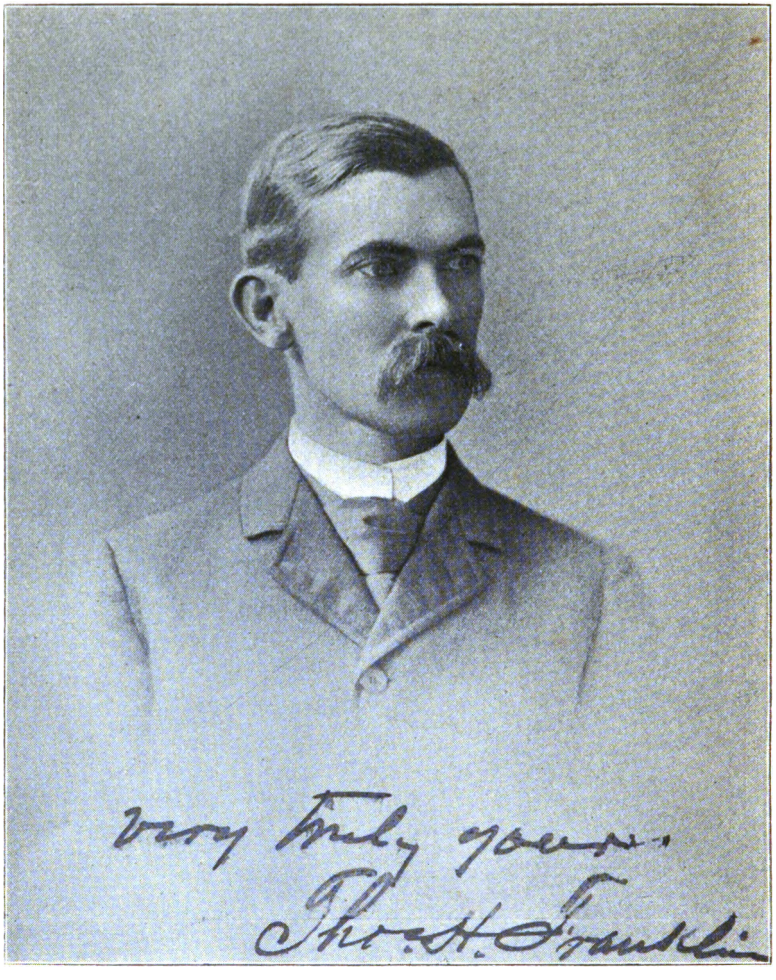
Proceedings of the ... Annual Sessions of the Texas Bar Association

Texas Bar Association, Texas Bar Association Meeting





President Texas Bar Association,
1894-5.

PROCEEDINGS

OF THE

THIRTEENTH ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION,

HELD IN THE

CITY OF GALVESTON, JULY 25 AND 26, 1894,

WITH THE

CONSTITUTION AND BY-LAWS,

ALSO

OFFICERS, STANDING COMMITTEES AND ROLL OF MEMBERS,

FOR THE YEAR 1894-95.

AUSTIN:
PRINTED BY ORDER OF THE ASSOCIATION.
1894.

These Proceedings are published by authority and distributed to members by the Association.

CHAS. S. MORSE, *Secretary.*

The fourteenth annual session of the Association will be held in the City of Galveston, on the last Wednesday in July, A. D. 1895.

TEXAS BAR ASSOCIATION.

CONSTITUTION.

ARTICLE I.—NAME AND OBJECTS OF THE ASSOCIATION.

SECTION 1. This Association shall be called the TEXAS BAR ASSOCIATION.

SEC. 2. Its objects shall be to advance the science of jurisprudence, promote the uniformity of legislation in the administration of justice throughout the State, uphold the honor of the profession of the law, and encourage cordial intercourse among its members.

ARTICLE II.—MEMBERSHIP.

SECTION 1. Any attorney of the Texas bar, in honorable standing, upon his written application, may be admitted to membership at any regular meeting of the Association. Said application must be endorsed by three members of the Association, and a fee of $5.00 shall accompany the same—$2.50 initiation fee and $2.50 annual dues.

SEC. 2. Such application shall be referred to the Board of Directors, who shall report the same to the Association, and, if said report be favorable, a ballot shall be taken, and if four-fifths of the members voting shall be in favor of the applicant he shall be declared elected.

ARTICLE III.—OFFICERS AND THEIR DUTIES.

SECTION 1. The officers of the Association shall be a President, a Vice-President, a Secretary and a Treasurer, who shall be chosen by ballot at a regular meeting, by a majority of the members present and voting.

SEC. 2. There shall be a Board of Directors, five in number, elected at the same time and in the same manner with the officers; and the President and Vice-President shall be ex-officio members of the Board.

SEC. 3. The officers and Directors shall hold their places for one year, and until their successors shall be elected; provided, that the same person shall not be elected President two years in succession.

SEC. 4. The duties of officers shall be such as usually devolve upon such positions, and may be regulated and prescribed from time to time by the Constitution, By-laws, or resolutions of the Association.

SEC. 5. The Board of Directors shall have exclusive authority, and shall exercise executive supervision over the affairs of the Association between its meetings.

SEC. 6. Vacancies in the offices and Board of Directors shall be filled by the Board, the concurrence of a majority of whom shall be necessary to a choice.

ARTICLE IV.—COMMITTEES.

SECTION 1. The following committees shall be appointed annually by the President for the year ensuing, and shall consist of five members each: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Criminal Law and Criminal Procedure; on Commercial Law; on Publication; on Grievances and Discipline.

SEC. 2. A committee of three, of whom the Secretary shall always be one, shall be appointed by the President at each annual meeting of the Association, whose duty it shall be to report to the next meeting the names of all members who shall in the interval have died, with such notices of them as shall, in the discretion of the committee, be proper.

ARTICLE V.—GENERAL POWERS.

SECTION 1. This Association shall have power to impose fines, assess fees, and establish by-laws for its government. It shall have power to remove officers and suspend or expel members for good cause, upon written charges exhibited against them by a member, and due notice given of the charges and of the time they will be brought before the Association.

SEC. 2. The By-Laws shall prescribe the assessment to be levied on the members for the support of the Association and the promotion of its objects.

ARTICLE VI.—QUORUM.

SECTION 1. Twenty-five members in regular standing shall constitute a quorum for the transaction of business.

ARTICLE VII.—ANNUAL ADDRESS.

SECTION 1. The President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice.

ARTICLE VIII.—MEETINGS.

SECTION 1. A majority of the members present at an annual meeting of this Association shall designate the time and place for holding the next annual meeting.

ARTICLE IX.—AMENDMENTS.

SECTION 1. All propositions to alter, amend or add to this Constitution

shall be made in writing at a meeting of the Association, and filed with the Secretary at least one month before being acted upon, and shall not be adopted without the concurrence of two-thirds of the members present.

ARTICLE X.—DUES.

SECTION 1. Each member of the Association shall pay to the Secretary the sum of $2.50 as annual dues.

BY-LAWS.

ARTICLE I.—PRESIDING OFFICERS.

SECTION 1. The President, and in his absence the Vice-President, shall preside at all meetings of the Association; if neither of these officers be present, a President pro tem. shall be chosen by and from the attending members.

ARTICLE II.—ADDRESS AND ESSAYS.

SECTION 1.—The Board of Directors, at its first meeting after each annual meeting, shall select some person to make an address at the next annual meeting, and not exceeding six persons to read papers.

ARTICLE III.—ANNUAL MEETINGS AND ORDER OF BUSINESS.

SECTION 1. The order of exercises at the annual meeting shall be as follows:

1. Opening address of the President.
2. Nomination and election of members.
3. Report of the Board of Directors.
4. Election of the Board of Directors.
5. Reports of Secretary and Treasurer.
6. Reports of Standing Committees, as follows: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Commercial Law; on Publication; on Grievances and Discipline.
7. Reports of special committees.
8. Nomination of officers.
9. Miscellaneous business.
10. The election of officers.
11. The annual address, to be delivered by the person selected by the Board of Directors, shall be made at the morning session of the second day of the annual meeting.

SEC. 2. This order of business may be changed at any meeting by a vote of a majority of the members present; and, except otherwise provided by the Constitution or By-Laws, the usual parliamentary rules and orders will govern the proceedings.

SEC. 3. No person shall speak more than ten minutes at a time, nor more than twice on the same subject.

SEC. 4. A stenographer shall be employed at each annual meeting.

SEC. 5. Each county bar association may annually appoint delegates, not exceeding three in number, to the next meeting of the Association, and such delegates shall be entitled to all the privileges of membership at and during said meeting.

SEC. 6. All papers read before the Association shall be lodged with the Secretary. The annual address of the President, the reports of the committees and proceedings of the annual meetings shall be printed, but no other address made or paper read or presented shall be printed except by order of the Committee on Publication.

SEC. 7. The Board of Directors shall, as soon as parties have been selected to deliver the annual address and read essays, notify the Secretary of this Association of such selections, and of any other matters of especial interest to be brought before the next annual meeting.

SEC. 8. The Secretary shall be and is hereby required to mail each member of the Association, ten days before each annual meeting, a written or printed notice of the time and place of such meeting, giving a statement of the addresses to be delivered, the papers to be read, and other matters of especial interest, and shall also cause such notice to be published.

ARTICLE IV.—MEMBERSHIP AND DUES.

SECTION 1. The initiation fee to entitle a person to membership shall be five dollars, which shall include the annual dues for the first year.

SEC. 2. The annual dues shall be payable at the annual meeting, in advance, and should any member neglect to pay them for any year at or before the next annual meeting, he shall cease to be a member. The Secretary shall give notice of this By-Law, within sixty days after each meeting, to all members in default.

ARTICLE V.—OFFICERS AND COMMITTEES.

SECTION 1. The terms of office of all officers elected at the annual meeting shall commence at adjournment thereof, except the Board of Directors, whose term of office shall commence immediately upon their election.

SEC. 2. The President shall appoint all committees, except the Committee on Publication, within thirty days after the annual meeting, and shall announce them to the Secretary, who shall promptly give notice to the persons appointed. The Committee on Publication shall be appointed on the first day of each meeting.

SEC. 3. The Secretary's and Treasurer's reports shall be examined and audited by the Board of Directors before their presentation to the Association.

SEC. 4 The Board of Directors and all standing committees shall meet on the day preceding each annual meeting, at the place where the same is to be held, at such hour as their respective chairmen shall appoint, and should any member of any committee be absent, the vacancy may be filled by the members of the committee present.

SEC. 5. The Committee on Publication shall meet within one month after each annual meeting at such time and place as the chairman shall appoint.

SEC. 6. Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint; reasonable notice shall be given by him to each member by mail.

ARTICLE VI.—DUTIES OF COMMITTEES.

SECTION 1. It shall be the duty of the Committee on Jurisprudence and Law Reform to consider and report to the Association such amendments to the law as in its opinion should be adopted; also to scrutinize proposed changes in the law, and, when necessary, report upon the same.

SEC. 2. It shall be the duty of the Committee on Judicial Administration and Remedial Procedure to observe the practical working of the judicial system of the State, and recommend by written or printed report, from time to time, any changes therein which observation and experience may suggest.

SEC. 3. It shall be the duty of the Committee on Legal Education and Admission to the Bar to report the most suitable means for promoting and facilitating the study of the law, and the necessity or propriety of elevating the standard of qualifications for admission to the bar, and the best means for accomplishing that object.

SEC. 4. It shall be the duty of the Committee on Commercial Law to report the best means to produce uniformity in commercial law and usages.

SEC. 5. The Committee on Publication shall pass upon and have printed all papers, should they deem them of sufficient importance, except as it is otherwise provided by the Constitution and By-Laws.

SEC. 6. The Committee on Grievances and Discipline shall report as to the best means of upholding the honor and dignity of the law in the professional intercourse among the members of the Association. All complaints against any member of this Association shall be presented to this committee, and if the committee shall be of the opinion that the matters alleged are of sufficient importance, they will determine upon the course of procedure for the trial of the same; and shall give notice to the party charged of the nature of the complaint and the time of the trial thereof by

the Association; all of which the complainant shall also be notified by the committee.

ARTICLE VII.—RESOLUTIONS.

SECTION 1. No resolution complimentary to any officer or member, for any service performed, paper read or address delivered, shall be considered by this Association.

ARTICLE VIII.—AMENDMENTS.

SECTION 1. These By-Laws may be amended at any meeting of the Association, by a vote of two-thirds of those present; provided, that a copy of the proposed amendment shall have been filed with the Secretary on or before the first day of such annual meeting.

PROCEEDINGS

OF THE

THIRTEENTH ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION.

HELD IN THE

CITY OF GALVESTON, JULY 25 AND 26, 1894.

FIRST DAY—MORNING SESSION.

GALVESTON, TEXAS, July 25, 1894.

The Thirteenth Annual Session of the Texas Bar Association was held in the city of Galveston, commencing Wednesday, July 25, 1894.

Hon. S. C. Padelford, President of the Association, called the meeting to order, and, a quorum being present, the reading of the minutes of the last annual meeting was, on motion, dispensed with.

President Padelford then read his annual address. (See appendix.)

At the close of his annual address, President Padelford congratulated those present on the business-like appearance of the meeting, stating that he recognized many of the leading lights in the profession who had come to assist in advancing the science of jurisprudence and to promote the uniformity of legislation in

the administration of justice throughout the State, to uphold the honor of the profession of the law, and encourage cordial intercourse among its members. He hoped this large gathering would redound to the good of the Association, and that this meeting would devise some means to increase the number, though it could not increase the quality of its members.

On motion of Wm. L. Prather, so much of the President's address as relates to admission to the bar was referred to the Committee on Legal Education and Admission to the Bar for special report.

The Board of Directors made the following report:

To Hon. S. C. Padelford, President Texas Bar Association:

The Board of Directors have had under consideration the following applications for membership:

T. H. Ball, of Huntsville; C. N. Buckler, of El Paso; R. E. Carswell, of Decatur; H. C. Carter, of Del Rio; L. F. Chester, of Woodville; T. B. Cochran, of Austin; L. G. Denman, of San Antonio; H. M. Garwood, of Bastrop; John H. James, of San Antonio; W. M. Key, of Austin; R. E. L. Knight, of Dallas; Charles K. Lee, of Galveston; M. L. Malevinsky, of Galveston; Eugene Marshall, of Dallas; A. T. McKinney, of Huntsville; D. A. Nunn, Jr., of Crockett; A. C. Prendergast, of Waco; M. A. Spoonts, of Fort Worth; Will L. Vining, of Austin; B. R. Webb, of Baird; Thos. F. West, of Fort Worth; A. E. Wilkinson, of Denison; Charles I. Williams, of Caldwell, and F. A. Williams, of Galveston, and beg to report favorably upon them, and recommend that the applicants be elected to membership.

We also have examined the reports of the Secretary and Treasurer, and find them correct in every particular.

In compliance with our requests, heretofore made, the annual address will be delivered by Hon. B. D. Tarlton, Chief Justice of the Court of Appeals at Fort Worth, and the following gentlemen have kindly consented to prepare and read papers:

Chas. S. Todd, of Texarkana—"Assignments for the Benefit of Creditors."

E. B. Perkins, of Greenville—"The Statutory Craze."

Dudley G. Wooten, of Dallas—"The Law of Contributory Negligence."

Robert G. Street, of Galveston—"Medical Jurisprudence."

Norman G. Kittrell, of Houston—"Criminal Law of Texas and its Administration."

W. F. Ramsey, of Cleburne—"The Old Court."

T. H. Conner, of Eastland—"Juries, and Jury Trial."

H. M. Gossett, of Kaufman—"Corporate Land Ownership."

Edwin Hobby, of Houston—"The Legal Profession, its Value, Importance and Influence."

T. F. Harwood, of Gonzales—"The Respect Due by Members of the Bar to the Judiciary."

Papers are also being prepared by the following gentlemen: L. C. Alexander, of Waco; J. W. Terry, of Galveston; Philip Lindsey, of Dallas, and T. S. Miller, of the University of Texas.

In addition to the above, Judge T. J. Brown, of the Supreme Court, is preparing a report showing the workings of the Courts of Civil Appeals and the Supreme Court for the last year. This report is made in compliance with a request made by the Association, at its last annual meeting, and will be of much interest to the profession.

Respectfully submitted,

WM. H. CLARK,
ROBT. G. STREET,
L. R. BRYAN,
WM. L. PRATHER,
JAS. B. STUBBS,
Board of Directors.

The report was received and adopted, and the applicants duly and legally elected members.

The President stated the next business was the election of a board of directors for the ensuing term. The election resulted in the selection of the following: T. H. Ball, H. M. Garwood, James E. Hill, T. J. Ballinger and A. E. Wilkinson.

The Secretary then read his report as follows:

GALVESTON, TEXAS, July 25, 1894.

To the President and Members of the Texas Bar Association:

I have the honor to submit herewith my thirteenth annual report as Secretary.

Without giving the name of each member from whom dues have been collected, I have submitted my books and receipts to the Board of Directors, who have examined and approved this report. I have received from eighty-eight members the sum of $622.90, including ten initiation fees at our last meeting, which amount I have remitted to the Tresurer, and have his receipt. Fifty-nine of these collections were made through the bank of Jas. H. Raymond & Co., of Austin, and their report is in the hands of the Board of Directors. There are many members still in arrears for dues. I am only authorized to draw on them when the amount due is $5 or over. Some of our members object to paying dues when it is impossible for them to be present at the meetings. It is for the benefit of such members as cannot attend that I have taken special pains to get up an interesting report of the work done and to have published in the proceedings of each annual meet-

ing true copies of the addresses delivered and the various papers presented and read. The publication of these make a volume well worth the amount of annual dues, and if it is decided to hereafter publish in each annual proceedings the rules adopted by the Supreme Court for the "Government of the Courts of Texas," together with the amendments made from year to year, then the proceedings of our annual meetings will, when printed and bound, be of great value and benefit to the profession, and those members who are unable to attend the meetings will, upon payment of their dues, and application to the Secretary, be furnished with a publication fully worth the amount paid for annual dues, and which they could not otherwise well obtain.

We have had on our roll of members as many as 700 names, while now we have but 300, and nearly one-half of these are in arrearr for at least one year's dues. Our death roll numbers nearly seventy-five, and the past year has added six to the number.

The expenses for printing 600 copies of the proceedings of last session, and for postage, circulars, expressage, binding, stationery, and Secretary's salary, as per vouchers for each item examined and approved by the Board of Directors, amount to $356.00.

While the expenses for the last year have been less than for the year before, and the collections have been better, still there is an amount of unpaid dues which each member interested and owing should have forwarded to the Secretary, and get his receipt. I do not think a member should expect the Secretary to grant his request to drop his name from the roll while he is in arrears for dues.

Very respectfully submitted,

CHARLES S. MORSE, Secretary.

Mr. Prather moved that it be declared the sense of the Association that so much of the Secretary's report as refers to the publication of the Rules adopted by the Supreme Court for the government of the Courts of Texas be referred to the Committee on Publication, with instructions to have them published with the proceedings of this meeting.

The motion was unanimously adopted.

The President stated it was now his duty to appoint the Committee on Publication in order that they might receive and act upon such papers as were presented. He appointed the following: T. B. Cochran, of Austin; Wm. L. Prather, of Waco; Thos. F. West, of Fort Worth; James L. Autry, of Corsicana, and T. H. Ball, of Huntsville.

On motion of Lewis R. Bryan the regular order of business

was suspended, and Judge E. B. Perkins read to the Association a paper entitled "The Statutory Craze." (See appendix.)

Reports of Standing Committees were then in order, and the President called for the report of the Committee on Jurisprudence and Law Reform.

Mr. Kleberg was the only member of the committee present, and said he had no report to make, nor had he heard from any other member of the committee.

The report of the chairman of this committee was handed to the Secretary, but under the rules it could not be read, as it was the individual report of the chairman and not the report of the committee, and the report had not been submitted to and signed by other members of the committee. The Secretary then handed the report to Mr. Kleberg.

On motion of Mr. Harris, the Association adjourned until 3 o'clock p. m.

FIRST DAY—EVENING SESSION.

GALVESTON, July 25, 1894.

The meeting was called to order by President Padelford at 3 o'clock.

The Board of Directors reported favorably on the application of Seymour Kisch for membership. The report was received and adopted, and the applicant duly elected a member of the Association.

At the request of Mr. Kleberg, the Committee on Jurisprudence and Law Reform was granted further time to report.

On motion of R. Waverly Smith, the Committee on Legal Education and Admission to the Bar was granted further time.

On motion of Robt. G. Street, the report of the Committee on Commercial Law was postponed until tomorrow.

The Committees on Judicial Administration and Remedial Procedure; on Criminal Law; on Grievances and Discipline, and the Committee on Deceased Members, were granted until Thursday to make their reports.

General McLeary moved that the President be authorized to fill out the Committee on Jurisprudence and Law Reform, and that said committee have referred to them and take into consideration the report of Chairman Wm. L. McDonald, who is not present.

The motion carried, and the President appointed J. H. McLeary, Henry Cline, M. A. Spoonts and James E. Hill, to act with Mr. Kleberg on the committee, and to the committee thus completed the report of Chairman McDonald was referred.

The report of special committees was then in order, and the President called for the special report of Judge T. J. Brown, on the Workings of the Higher Courts.

Judge Brown stated that he was quite hoarse, and asked permission to read his report to-morrow, which was granted.

Judge Edwin Hobby was then introduced to the meeting, and read a paper on "The Legal Profession—Its Value, Importance and Influence." (See appendix.)

Judge E. J. Simkins, chairman of the Committee on Criminal Law, stated that no report would be made by the committee, but the Association would have presented to it, by Mr. Kittrell, a carefully prepared paper on the "Criminal Law of Texas and its Administration," which would doubtless take the place of, and be of more interest than a committee report.

R. G. Street, of Galveston, then read to the meeting a paper on "Medical Jurisprudence." (See appendix.)

Charles S. Todd, of Texarkana, read a paper on "Assignments for the Benefit of Creditors." (See appendix.)

Some little discussion among members was then had on points raised in the paper just read.

Judge Norman G. Kittrell then read a paper entitled "Criminal Law of Texas and its Administration." (See appendix.)

On motion of Robt. G. Street, the Association adjourned until to-morrow morning at 10 o'clock.

SECOND DAY—MORNING SESSION.

GALVESTON, TEXAS, Thursday, July 26, 1894.

The Texas Bar Association was called to order in the parlors of the Beach Hotel at 10 o'clock a. m., by President S. C. Padelford.

The Secretary stated that in comparing the report made by the Board of Directors on yesterday with the original applications on file, they had failed to insert in their list of applicants the name of Jas. E. Hill, Jr., of Livingston. This was evidently a mistake, as the application was properly reported on and the fee paid.

The chairman of the committee said the mistake occurred in transcribing the names, and on motion of J. H. McLeary, the application of Mr. Hill was re-referred to the Board of Directors.

Reports of standing committees being in order, the President called for a report from the Committee on Jurisprudence and Law Reform.

Mr. Kleberg said: In behalf of the committee appointed yesterday, and in behalf of the old committee, of which I was a member, and of which Mr. McDonald, of Dallas, was chairman, and which did not make any report, I will state Mr. McDonald has prepared a report and sent it to the Secretary. The report is one evidently gotten up with a great deal of care, and contains many most important subjects and proposes most extensive and radical changes in the laws of the State, and the committee appointed by the chair yesterday, to which this report was referred, has authorized me to request the Association that the report be referred to the new Committee on Jurisprudence and Law Reform, when appointed, for investigation and consideration, to be reported on by them at the next meeting of this Association.

The Board of Directors reported favorably on the applications of Sam. R. Scott, of Marlin; Jas. E. Hill, Jr., of Livingston, Maco Stewart, of Galveston; Jas. L. Harris, of Dallas, and W. L. Hill, of Huntsville, and recommended their election.

On motion, the report was adopted, and the applicants duly elected members of the Association.

On motion of W. L. Prather, a special committee of five members was appointed to give expression, in writing, of the feelings of the members of this Association touching the death of our late Chief Justice, John W. Stayton.

The President appointed on that committee Norman G. Kittrell, C. N. Buckler, Reagan Houston, W. L. Crawford and James B. Stubbs, and the committee were requested to make their report as soon as possible.

Hon. B. D. Tarlton then delivered the annual address of the Texas Bar Association. (See appendix.)

The Treasurer's report was then called for, and presented as follows:

To the President and Members of the Texas Bar Association:

As Treasurer of the Association, I have the honor to submit the following report of receipts and disbursements for the past year:

Balance on hand per last report		$ 421 59
Cash received from Secretary		622 90
Total receipts		$1044 49
DISBURSEMENTS:		
Paid draft of J. N. Henderson, President, for expenses per Secretary's report	$358 00	
Paid draft Board of Directors for banquet	239 50	
Total expenses		597'50
Leaving a balance on hand of		$ 446 99

Respectfully submitted,

WM. D. WILLIAMS, Treasurer.

The report was received and adopted.

Judge T. H. Conner, of Eastland, was then introduced, and read a paper on "Juries and Jury Trials." (See appendix.)

The President called for the report of the special committee appointed to draft resolutions on the death of Chief Justice Stayton, and Norman G. Kittrell, chairman of the committee, presented the following:

Hon. S. C. Padelford, President Texas Bar Association:

Your committee appointed to make a report of the sense of this Association touching the death of the Hon. John W. Stayton, late Chief Justice of the Supreme Court of Texas, begs leave to report the following:

Obedient alike to the requirements of propriety and the promptings of

the profound admiration and esteem entertained by the members of the Bar Association of Texas for Judge Stayton, they desire to place on record the testimony of the respect and reverence for the simple, noble manhood of his life, and their unfeigned sorrow at his death.

When called to the Supreme Court of Texas he came unheralded, and, to many of the profession, unknown, but it was soon made manifest that there had come from a quiet country town a lawyer indeed and in truth, and day by day and year by year he grew and strengthened in the esteem and affection of the bar and people, and when he reached the exalted position in which death found him, all men knew that it had never been more worthily filled, and that never had the ermine fallen upon one more fit to wear it, nor who would more nobly sustain that lofty standard of judicial ability and integrity which for nearly fifty years has characterized the Supreme Court of Texas. Judge Stayton never appealed to the dramatic or sensational to attract to himself the public gaze. He essayed no new departures from the staid paths of the law for the sake of novelty, but he hesitated not, when truth and duty led, to go often where the way had not been made plain, nor to place the lights of judicial learning and legal science where they had not been placed before, and whatever position he assumed he maintained on principle and with a wealth of authority and a power of logic which at once defied attack and baffled criticism. Behind the lawyer and the judge was, if possible, the more admirable man, calm, self-possessed, forcible, dignified, yet never austere, "he stood four square to every wind that blew," with an integrity so lofty and a personal and official purity so spotless that truth could not and malice dare not assail him. The same courage, ability and persistency that lifted him from obscurity and poverty to exalted position marked his whole career, and in every field of endeavor he was the same brave, earnest, honest man. Self-reliant from conscious power, yet with the humility of the truly great, he bowed an humble worshiper at the foot of that cross where is found peace, alike for the lowliest and loftiest of the children of men.

When this earthly term was ended, and the record of his well-spent life was closed and clasped, he passed up before the Great Judge by a pathway illuminated by that Christian faith which had been by him in his daily walk and conversation illustrated unto his fellow men.

We ask that this report be spread upon the minutes of this Association, and that a copy thereof, properly engrossed, be transmitted to the widow of Judge Stayton, with the assurance of the earnest sympathy of the members of this body for herself and children.

Respectfully submitted,

NORMAN G. KITTRELL,
C. N. BUCKLER,
W. L. CRAWFORD,
REAGAN HOUSTON,
J. B. STUBBS,
Committee.

On motion of Wm. L. Prather, the report was adopted by a rising vote.

General McLeary moved that the chair appoint a committee to present a copy of the resolutions to the Supreme Court, and the motion was adopted.

President Padelford read the following from Ex-Governor O. M. Roberts:

MARBLE FALLS, TEXAS, July 21, 1894.

To the President of the Texas Bar Association:

DEAR SIR:—Supposing that resolutions of respect to the late Chief Justice of the Supreme Court of Texas will be passed by your body, I desire to add my tribute of respect, which can not be better done than by stating how he came to be first appointed Associate Justice of the Supreme Court. He, as practicing attorney, attended the Supreme Court at Galveston during the five years that I was last Chief Justice of that court. His briefs and arguments were of the highest order, characterized by diligent research in the law applicable to his cases, a fair statement of facts pertaining to them, and reasonable deductions from the law and facts presented by him, to all of which must be added that his manner and style was calm, deliberate and respectful to the Court and those opposed to him.

Afterward, while I was Governor, there was a vacancy on the Supreme Bench to be filled by appointment. Being then well acquainted with the leading members of the bar in the State, in the search of a lawyer of ability whose mind and manner were peculiarly fitted for judicial position, I selected him.

Without his solicitation, or that of any other person, I sent his commission of appointment to him as Associate Justice of the Supreme Court of Texas. That was much more a matter of surprise to him than it was to other lawyers, who knew him well, after they heard of it. He accepted the appointment, was afterward elected, and if he had lived until after the ensuing election, he would have been made Chief Justice again, thereby recognizing his great merits as a judge. I have had the good fortune to have made many appointments that gave me great gratification by their successful performance, but in no case have I been more gratified than in the distinguished success of the late Chief Justice, John W. Stayton. His personal modesty and pleasantly retired manners were such as would have prevented him from aspiring to such a position of his own accord. His eminent qualities as a lawyer and a man had to be brought to public view by conferring upon him, unasked, a position that enabled him to exhibit them for the public benefit of his country.

This account of his appointment and success may furnish an example for the enconragement of the younger members of our profession, and for imi-

tation by those in authority to bring true merit to the front in the service of the State. Respectfully, your obedient servant,

O. M. ROBERTS.

On motion of John G. Winter, the above letter was referred to the Committee on Publication, to be printed in the minutes of the Association.

The President appointed J. H. McLeary, of San Antonio, to present the report of the committee and the resolutions in regard to the death of Chief Justice Stayton to the Supreme Court of Texas on behalf of the Texas Bar Association.

Major F. Charles Hume asked if the Secretary had received a paper from Dudley G. Wooten, of Dallas, and was informed that it had not been received.

Major Hume then stated: "I will state that the Secretary showed me, last evening, a telegraphic message from the Hon. Dudley G. Wooten, of Dallas, who was appointed to read a paper before the Association, in which he informed the Secretary that the paper had been sent to me for presentation to this meeting, and that it would arrive in the mail of yesterday. It has not arrived, and I make this statement so that it may be known to the members that the duties devolving upon Mr. Wooten have been performed, though from some accident, which I can not explain, the paper has not reached me, otherwise it would have afforded me great pleasure to present it, and I know this company would have requested the Secretary to read, in Mr. Wooten's absence, the paper which he has evidently prepared and supposed would be here in time for presentation to the Association."

Major Hume continuing, said: "While on my feet, Mr. President, I desire to ask your instructions, and that of the Association, with respect to the matter that was referred to your committee on yesterday. You will remember that I was called for as the chairman of the Committee on Deceased Members, but that I announced to the chair that it was the first intimation I had received of the fact of my connection with the committee. I do not know by what accident the message, which I am sure the uniformly attentive Secretary mailed me, did not reach my hands, but such is the fact. I extremely regret it, because I feel whatever function is devolved upon a member of this Association should be readily accepted and willingly performed. The time elapsing since my information of this matter has, of course, been altogether inadequate to collect the facts and data that would be essential to any proper response to the duties of that

committee. You well know, Mr. President, and many members, if not all the members of the Association, well know upon reflection, that the last to go has been an eminent one. There are several of our membership to whom, since the last convention of this Association, the great majority has been revealed, to which you and I and all of us approach nearer and nearer day by day. Of these, may be mentioned Botts, of Houston; Tucker, of Galveston; Walthall, of San Antonio, and Burts, of Austin; men highly known and highly regarded in their professional and personal connection with this Association, and the bars of this State; men so well known, indeed, that it is not needful for their memory that formal tribute should be accorded them; men distinguished as lawyers, influential, in good relations to the bar and the administration of justice and public affairs. And yet another, the last to whom the stroke of death came, no longer encourages and inspires us by his personal presence; the one to whom a gracious tribute, and just, has been accorded by the special committee appointed for that duty, through Judge Kittrell, the chairman, who has so faithfully and truthfully discharged it by the resolution adopted by the Association. I refer, of course, to the lamented Chief Justice Stayton, an ornament and an honor alike to the bar and the bench, whose stainless fame even now mounts to the unfading stars. My purpose, Mr. President, in rising with respect to this subject, was to submit to the pleasure of the chair and of the Association with regard to the performance of the duty devolving upon the present Committee on Deceased Members. Under the order of business and appointment, it would become the duty of that gentleman who shall succeed to the honors the President now holds, to appoint a committee on deceased members, and I simply desire to observe this, and to say that the present committee, if it be within the rules of the Association, and if it be the requirements of the Association, do not shrink from the performance of that service, so soon as they shall be able to collect the facts which will enable them to discharge it. In tendering the services of the committee to still perform the duty, I do so with the suggestion that the Association may deem it best to discharge this committee and intrust its duties to the incoming committee, when it is appointed. Either decision of what is required or what is desired, would be acceptable, Mr. President, to the present committee. We stand ready to perform that duty, or to assist the committee which shall succeed us."

On motion, the verbal report of the chairman of the committee was received, and he was requested to reduce it to writing and furnish it to the Secretary, with such enlargement as the com-

mittee may deem proper, for publication in the proceedings of this meeting.

The Committee on Legal Education and Admission to the Bar, made the following report:

GALVESTON, July 26, 1894.

To the Hon. S. C. Padelford, President Texas Bar Association:

Your Committee on Legal Education and Admission to the Bar beg leave to submit the following report:

Our President yesterday, in his annual address, in discussing, among other subjects, "The Standard for Admission to the Bar," has expressed the views of this committee so clearly and forcibly that we feel that we can not do better than adopt and ratify his views on this subject as part of our report.

By way of practical suggestion, your committee respectfully submits that the evil can be remedied by the passage of a law similar to that adopted by New York and Minnesota, whereby the examination of applicants for admission to the bar is relegated to a State board of examiners, appointed by the highest judicial tribunal in the State, whose duty it is to hold examinations at stated times, and who shall prescribe such rules and regulations for the conduct of such examinations as to them may seem proper. In the State of Minnesota, in addition to the right of admission after examination by the board, the holders of diplomas from the Law Department of the State University are admitted without further examination. We already have a similar statute in this State.

One of the chief objects to be attained in all such regulations is uniformity of examination. Without, therefore, suggesting any change in our statute as it now stands with reference to the admission of holders of diplomas from the Law Department of the University of Texas, uniformity of examination could only be secured by the appointment and selection of a board of examiners which will act in harmony and accord with the Law Department of the State University. Your committee respectfully recommend that a board of examiners, not to exceed five, and to include as members thereof the faculty of the Law Department of the State University, shall be named, selected and qualified as a board, under such rules and regulations as they may see proper to adopt. That the examinations for admission to the bar be held in the city of Austin, at such times as the board may prescribe.

In conclusion, your committee respectfully recommends that a committee of three be appointed by the President of this Association to draft and have presented and urged to the next Legislature a bill embodying the foregoing recommendations.

Respectfully submitted,

J. C. CRISP,

R. WAVERLY SMITH,

For the Committee.

Col. W. B. Denson moved the adoption of the report, which was seconded by Mr. J. C. Harris.

Mr. Prather said: "There are some suggestions in that report I think are right, but there is at least one objection to its adoption, and that is the inconvenience and expense applicants would be subjected to if required to apply at just one certain place for examination, and in this connection I wish to make this statement with reference to the manner of examinations which has been adopted by the University of Texas for those who enter the Freshmen Department: These examinations are prepared by the authorities there, and are sent out to the public schools—sent under seal—and delivered to a responsible person residing where the examination is to take place, and the same examination is by this means conducted at different points in the State, and it strikes me that some such method might be adopted for the examination of applicants to the bar. While I do not desire to offer an amendment to the report, I would suggest that the committee take into consideration some such plan as that adopted by the University, in order to obviate what might otherwise prove to be a serious objection.

Mr. Cline said: The recommendation of having the committee consist of five members, including the Faculty of the University, which I believe is three, would practically require every applicant for admission to the bar to pass the examination of the University. The University professors have an authority that would naturally be deferred to by the other two members. I think it would be better to adopt the rule of other States. In Louisiana, where I was admitted to the bar, it is provided that holders of a diploma from the University shall be entitled to admission to the district courts by virtue of that fact, and that all other applicants for license to practice law shall be examined at the seat of government by a committee selected for that purpose. We might put one member of the Faculty of the University on our examining committee, though I see no good reason for it, or we might adopt the method of the Superintendent of Education, and prepare printed questions and send them out to a legal examiner of character and integrity, who will see that the answers to the questions are reduced to writing without assistance. I do not decidedly object to the committee being constituted of five, and three of them to be of the Faculty of the University, but I think it would comport more with the dignity of the University to make its diploma an admission to the bar by itself.

Mr. Denson said: I do not understand that the committee suggested a change in the law with reference to admission to the bar,

where the candidates applying are graduates of a university, for it is understood by me that when a graduate presents his diploma from the Law Department of the University of Texas to the proper authorities, a license is granted; but the report refers to those who have not graduated in our State University, or in any proper law university of other States, and requires that they, if they wish to obtain license to practice law, shall be required to submit to the proposed examination. There is no observing member of our bar who has not with regret seen the operation of the present system of obtaining admission to the bar of Texas. The examination practically amounts to nothing. The standard should be elevated, and I think many of the sentiments which have been expressed here to-day and on yesterday, are looking beyond and higher than even this recommendation of the committee. The higher we make the standard and the more rigid the rule, the better. I believe the recommendation made by the committee is in line with the desired requirement, and I hope it will be adopted.

Mr. J. C. Harris opposed the adoption of the report, and thought none of the plans proposed were practicable. He suggested that the matter of examination be placed in the hands of the Courts of Civil Appeals, who were always in close touch with the active members of the bar. He thought that applicants for license to practice law should be examined by active practicing members of the bar.

Mr. Smith, in speaking to his report, said it was not contemplated that the examination of the candidate for admission to the bar shall be relegated to teachers, nor is it necessarily contemplated that it shall involve a trip to Austin to stand an examination. That feature is a matter of detail and can be arranged by the board after its appointment. The purpose of suggesting the appointment on that board of the members of the Law Department of the University of Texas, was to secure uniformity of examination, and the lack of that uniformity, I take it, is the chief objection to our present system. As was observed on yesterday, the qualifications for admission to the bar were as varied as the opinions of the fifty different district judges in this State. We have a law on our statute books making a diploma from the Law Department of the University sufficient to entitle the holder thereof to admission to the bar. It is not contemplated by that resolution to change or modify that law, but it is suggested, in addition to that law, that one be passed in line with the laws of New York and Minnesota, providing for the appointment of a State board of examiners, and that appointment can be made by the Supreme Court; and, for the purpose of securing uniformity

of examination, it is suggested that two of the members of that committee be the heads of the Law Department of the University, so that an applicant for admission to the bar, who has not had the opportunity of spending two years in the University, would not be placed in a more disadvantageous position than one who has, but they each would have to stand the same examination and be upon the same footing. It occurs to me that the recommendation is a practical one. I have not had the opportunity of considering it in all its details, but that can be a matter of adjustment hereafter, and I firmly believe it is a step in the right direction, and the adoption of it by this Association will blaze the path in which the bar can hereafter tread, looking to a higher standard for admission to its ranks.

Mr. E. F. Harris was opposed to members of the Law Department of the University serving on an examining committee, and described the workings of committees in other States.

Mr. Ball moved that the report be referred back to the committee with instructions to report more thoroughly.

General McLeary was opposed to postponement, because, as he said, anything is better than the present system, and the present report is better than nothing. He approved the suggestions made by Mr. J. C. Harris, and stated that if they had been reduced to writing, and offered as a substitute to the report, he would vote for it.

Mr. Cochran said: If the Board of Education are in earnest in this matter, they have the remedy in their own hands, for, so far as my observation goes, there is no trouble except in the line laid out in the President's address, and that is the certificate of character. I do not think there is any trouble in the legal attainments for those admitted to the bar, for the rule prevails, "the survival to the fittest." I think the whole thing is a matter we can regulate ourselves; and for one, I am in favor of indefinite postponement.

Mr. Franklin spoke in support of the resolution, as follows: It seems the details of the matter are not so important as the principle. I think it is essential not only on account of the dignity of our profession, but it is a duty we owe to those young men who aspire to admission to the bar. The student should know, when he undertakes the study of the law, that he can't get into our profession until he has made of himself a lawyer, or at least thoroughly grounded himself in the principles of the law. It is true it may cause some applicants a certain kind of difficulty in going to the capital of the State to be examined, but my expe-

rience is if a man thinks he has that in him which will make him a lawyer, you may throw every obstacle in his way and he will be a lawyer in spite of it. I am strongly in favor of the report of the committee, or something in the same direction. The principles of it are in the right line, and the details can be arranged hereafter.

Judge Key, in submitting a substitute for the pending motion, said: I concur, in the main, with the gentleman who has just preceded me. I indorse, and I believe—and perhaps a majority of the Association believe and indorse—what the President said on this subject, in his address before the Association on yesterday. The report of the committee not only heartily indorses those recommendations, but it goes still further and into detail, some of which details appear to be objectionable to some members of the Association. I therefore move, as a substitute for all the motions, that a committee of three, consisting of the present President of the Association and two others, be appointed, to whom this matter be referred, with instructions to prepare a bill to be submitted to the legislature, carrying out the ideas presented on yesterday, in the President's report. I do not understand that report recommended there should be a general committee that should sit all the time at the capital, for that might not be found expedient; but a bill might be passed requiring the committee to meet in different portions of the State, and hold examinations at different places. In so far as putting the law professors of the University on the committee, I think we may save ourselves any useless talk on that subject. I think they now have as much as they can do, and while I am not authorized to say so, I do not believe they will willingly consent to serve on such a committee, and have therefore nothing to express as to whether or not they should be requested or required to so serve. I also move that the suggestions made by the President yesterday in his address be adopted; as to how they should be carried out in detail, I am not prepared to say. It is but natural to suppose the President has given the matter more thought than any member of the Association; and my motion is that a committee of three, consisting of the President and two other members, be appointed and directed to prepare the bill.

Mr. Ball withdrew his motion to refer.

Mr. Ballinger offered as an amendment to the motion of Judge Key, that the committee be composed of President Padelford, J. C. Crisp and R. Waverly Smith.

Pending further discussion, the Association, on motion of A. C. Prendergast, adjourned until 3 o'clock p. m.

SECOND DAY—EVENING SESSION.

GALVESTON, July 26, 1894.

The meeting was called to order at 3 o'clock p. m. by President Padelford.

The first business in order was the consideration of the substitute offered by Judge Key, and the President requested him to again state the substitute.

Judge Key said: My motion was this, that so much of the President's address as relates to applicants being admitted to practice law, be approved by the Association, and that a committee of three, one of whom shall be the President now occupying the chair, be appointed to prepare a bill to carry out the ideas suggested in said address, and that the bill, when so prepared, be presented by the committee to the legislature. The motion was unanimously adopted.

Judge T. J. Brown then read to the Association the following paper, entitled, "Workings of the Higher Courts," embracing his report showing the work done by the Supreme Court and the Courts of Civil Appeals during the last year:

Mr. President and Gentlemen of the Texas Bar Association:

The judicial department of a government can not be created in complete form by constitutional provisions; the constitution of a State should, in general terms, confer and limit the jurisdiction of courts in so far as may be necessary to prevent hurtful changes by hasty legislation, but should go no further into particulars, leaving it to the legislative department of the government to prescribe rules of procedure, and to regulate, from time to time, the exercise of the power conferred, in that manner that may appear to be necessary to secure the performance, by the courts, of their functions.

The constitution of 1876 furnishes us with a striking example of the evil effects of too much detail in the regulation of courts by fundamental law. In that constitution it was attempted to preclude legislation upon the subject of the courts, which resulted in so embarrassing them, that they were not able to discharge their duties in an effective manner; and the legislature was, by these restrictive provisions, deprived of the power to give relief, which made necessary the amendment to Article 5 of the constitution, adopted in 1891. This amendment forms the basis of a new judicial system for the State which, by its flexibility, is capable of being so far perfected as to enable the courts to meet the increasing demands of business, and will, in due time, give satisfaction to the bar and the people.

My object in writing this article is to group a few well known facts which will show that the Supreme Court, under former constitutions, was wholly inadequate to the demands of litigation in this State, and that under those constitutions the legislature had no power to relieve the people of the inconveniences and losses incurred by delay in determining causes on appeal; also, to present for your consideration, in concrete form, a statement of the work accomplished by the Courts of Civil Appeals during their last terms which, when considered as a whole, will prove that in the short time that they have been upon trial, these courts have shown a capacity to dispatch business as it could not be done before, and that the results will, when fairly examined, give satisfaction to the bar. From what has been accomplished by these courts, I believe that the new system will, in the near future, reach the desired point when litigation will be speedily and satisfactorily determined.

When Texas became an independent republic, its population was small, its business transactions insignificant, and the necessity for courts not great. The convention which framed the constitution for the Republic conferred the appellate jurisdiction of the judicial department upon a Supreme Court, composed of a chief justice, with the judges of the district courts as associates. This was sufficient to meet the demands of litigation at that time, but in seven years population and business had so increased, that this provision for courts was no longer sufficient to meet the necessities of increased business; and the convention which assembled in 1845 to frame a constitution for the State, upon its admission into the Union, found it necessary to make a radical change in that department of the State government. The Supreme Court was invested with the same jurisdiction as before, but its organization was changed so as to make it a separate and independent body, composed of a chief justice and two associate justices. This proved to be much more satisfactory in many respects; business was disposed of more rapidly, and the opinions of the judges showed evidence of more mature consideration of the questions submitted for determination.

The Supreme Court, as organized under the constitution of 1845, continued practically the same until after the close of the war between the States, the result of which rendered it necessary that a new constitution should be made to suit the changes wrought by the war, and the demands made upon the State under the reconstruction policy of the President of the United States.

The convention which assembled in 1866 created a Supreme Court of five members, under which judges were elected, and entered upon the discharge of their duties, but in a few months they were removed by the military power of the United States, acting under the reconstruction laws of Congress. The military officers, having taken charge of the State government, appointed a court under this constitution. In 1868 a convention was called by authority of the reconstruction laws of Congress to frame a constitution for the State, in order that it might be admitted to representation in

the Federal Legislature. This convention submitted to such voters as were not disfranchised, a constitution which was adopted in 1869. It provided for a Supreme Court of three judges, which continued until 1873, at which time the Legislature submitted and the people adopted an amendment to the judiciary article restoring the Supreme Court to the number of five. Dissatisfaction with the constitution, in many respects, existed throughout the State, and in the year 1875, the sixth constitutional convention which has assembled in the history of Texas, was organized to frame another constitution, and again the judiciary underwent a change.

Business had so increased that it was found necessary to create separate appellate tribunals for criminal and civil cases. A Supreme Court of three judges was created with appellate jurisdiction of civil cases of which the district courts had original or appellate jurisdiction, and a Court of Appeals, with jurisdiction of all criminal cases, and of civil causes of which the county courts had original or appellate jurisdiction. It was thought that a liberal provision had been made for appellate tribunals, and that it would be sufficient for many years. Bnt it soon became apparent that litigation was keeping pace with the rapid and unexpected development of the resources of the State and its extending commercial relations, and the Supreme Court was unable to meet the demands made upon it by this great increase.

In 1881 these courts were found to be completely blocked with business, so that delay in the determination of causes on appeal often caused a practical loss of the interests involved. The constitution did not allow of any increase in the working power of the Supreme Court, and the legislature, in order to give relief, resorted to the temporary expedient of creating a commission of arbitration, consisting of three members, which, however, could only consider such cases, as by agreement of the parties, should be transferred to it by the Supreme Court and Court of Appeals. In the year 1883 the powers of this commission were so enlarged as to authorize the Supreme Court, on its own motion, to refer to the commission such cases as it deemed necessary in order to facilitate the dispatch of business. The existence of the commission was by this last act limited to the first day of October, 1885, and the legislature, having failed to extend the time, it then ceased to exist.

But it was soon discovered that the courts could not transact the business, and in 1887 the legislature re-enacted the law creating the Commission of Appeals to aid the Supreme Court and Court of Appeals in deciding civil cases. The industry and faithful work performed by these commissioners and the courts could not avert the inevitable, and in the year 1891 the commission was increased to six members to sit in two sections.

All of these expedients failed to accomplish the purposes for which they were intended, because under the constitution the Supreme Court was required to examine and approve each decision of the commissioners, which required so much of the time of the court that the loss in its working capacity was

equal to a large per cent of the aid given by the commissioners. The legislature at last realized, what had been apparent for some years, that the State must have a more elastic judicial system, and in 1891 submitted to the people, who adopted it, an amendment to the judiciary article of the constitution under which our present system is organized.

I have given this brief account of the changes in the appellate courts of the State in order to bring more clearly to your attention the one great necessity which brought about the change in our judiciary; there was an imperative demand for dispatch in the determination of civil suits. My object is to show in what manner the Courts of Civil Appeals have fulfilled the purposes of their creation, and that there is a well founded promise of better results in the future. It would be a useless consumption of time to enter into a statement of the constitution and laws creating these courts. A statement of their work during the recent terms will better serve my purposes.

I cannot state the number of cases that were transferred to the three Courts of Civil Appeals upon their organization, but the number was quite large. The three courts began work in October, 1892, and labored faithfully, but the business increased upon their dockets so rapidly that the legislature created two additional courts which were organized the first Monday in September, 1893, when the five courts began with 2247 cases on their dockets; during the terms, there were filed in these courts 1236 new cases, making in the aggregate 3483 cases. During the terms just ended the five courts finally disposed of 2101 cases, leaving on their dockets at adjournment 1382 cases, being 865 less than at the beginning of the terms.

Of the number finally disposed of by these courts 1277 were affirmed, or reversed and rendered, 707 were reversed and remanded, and 117 were disposed of on motion.

Of the cases affirmed, 1067 came from the district courts, and 210 from county courts. It has been impracticable for me to ascertain with certainty how many of the affirmed cases from the district courts belonged to the classes of litigation in which the Courts of Civil Appeals have final jurisdiction; making a liberal allowance for such cases as the Supreme Court have no jurisdiction of, I believe at least 800 of the judgments of the Courts of Civil Appeals in the cases affirmed below belong to those classes of which the Supreme Court has jurisdiction to grant writs of error.

During the recent term of the Supreme Court 290 applications for writs of error were presented to it, and since adjournment twenty-nine applications have been filed with the clerk of that court, making in all 319 applications for writs of error to the Courts of Civil Appeals in cases in which final judgments were rendered.

The Supreme Court dismissed thirty-four of these applications, for want of jurisdiction, refused 150, and granted 97, leaving 9 not acted on, because they were filed too late for examination before adjournment, and in a few instances because one of the associate justices was disqualified, and our lamented chief justice absent in his last sickness.

Upon final hearing the Supreme Court affirmed the judgments of the Courts of Civil Appeals in twenty-six cases and reversed and remanded thirty-four; reversed and rendered nine, reversed and reformed two, and in five cases reversed the judgments of the Courts of Civil Appeals and affirmed the judgments of the district courts, making a total of fifty cases in which the judgments of the Courts of Civil Appeals were not approved by the Supreme Court.

Upon an application for a writ of error the judgment of the Court of Civil Appeals is as thoroughly reviewed in the Supreme Court as if the case were before the court after writ granted, hence the refusal of the writ is to all intents an affirmance of the judgment of the Court of Civil Appeals. In judging of the work of these courts this fact is apt to be overlooked, and no credit given for cases in which writs are refused.

It will be seen from the statement given above that of the applications acted upon by the Supreme Court, in which the correctness of the judgments has been passed upon, 176 have been approved and fifty have been disapproved or modified. More than three-fourths have been found to be correct. This showing is highly creditable to the work of those courts.

In order to appreciate their work to its full merit, there is another fact which must be considered. Of the cases in which their final judgments were subject to writs of error, there are 481 in which no writs have been applied for, and the time having expired in which mandates are withheld, I presume that but few more will be filed. Why is it that writs have not been asked in these cases? It is a matter of common knowledge that lawyers and litigants do not submit to what they believe to be erroneous judgments when they have the right of appeal to another court; it is therefore fair to conclude that in those cases the judgments rendered were so manifestly correct that they were accepted by the losing party without complaint. Taking these into consideration, we find that more than four-fifths of the final judgments rendered by the Courts of Civil Appeals which might have been revised have been accepted as correct by the parties, or affirmed by the Supreme Court, upon examination.

It was feared by many that serious and numerous conflicts would occur in the decisions of these courts, sitting in different places, and some of them with scant provision in the way of books, but this evil has not arisen to any great extent. In fact, but few applications, based upon the ground of conflict, have been presented, and in the cases in which the claim has been made it has been found to really exist in but few instances. It is a matter of wonder that the decisions of these courts should, under all the circumstances, have been so uniform.

I suggest for consideration one defect in the present law, as it appears to me, which might be readily cured by amendment at the next session of our legislature, and from which much benefit will, in my opinion, be derived. Under the present law, when the decision of the Court of Civil Appeals reversing a judgment of the district court "practically settles" the case, the

Supreme Court may grant a writ of error. The difficulty is that under our system of practice it rarely appears from the record that new evidence may not be introduced so as to change the result under the decision, and the Supreme Court has been compelled to refuse writs of error in such cases. This may result in sending a case back for trial in the district court under an erroneous ruling by the Court of Civil Appeals, to be again tried and appealed to the Court of Civil Appeals, then removed to the Supreme Court by writ of error, there to be reversed and again returned to the district court for trial, attended with great delay and expense. If the law permitted the party in whose favor a judgment was rendered in the district court, when reversed upon appeal to the Court of Civil Appeals, to apply for a writ of error upon a statement that the decision practically determines the case, and to agree that the case might be finally disposed of in the Supreme Court upon the record, it would doubtless save much trouble of this kind. This would be just to all parties, for if the party recovering the judgment is really entitled under the law to maintain it, he should not be put to the expense and subjected to the delay of another trial in order to present the question to the Supreme Court, to be again sent to the trial court for another trial, and perhaps a third appeal.

Other amendments might be suggested, but it will be safer to resort to legislation only where experience shows the necessity for it.

Respectfully submitted,

T. J. BROWN.

Under the head of miscellaneous business, Judge B. R. Webb offered the following resolution:

Resolved, That we favor an amendment of the law such as shall place married women within the operation of the statutes of limitation, and dispense with the privy acknowledgment of conveyances executed by them.

Addressing the Association, Judge Webb said: Before making a formal motion for the adoption of this resolution, I will state that the full matter of the resolution comes within the jurisdiction of the Committee on Jurisprudence and Law Reform. That committee has not made any report to this meeting, and, therefore, the consideration of such a matter as this will have to come up on an independent resolution, and perhaps it will suit the Association to discuss this proposition now, so as to whet their logical blades and get them in good order. I now make a formal motion to adopt the resolution, and to discuss it now, if no motion be made to refer or otherwise dispose of it.

Mr. J. E. Hill moved to refer the resolution to the Committee on Jurisprudence and Law Reform.

Mr. C. S. Todd suggested that the resolution involves two distinct propositions, not necessarily germain to each other,—the question of the repeal of the law exempting married women from the operation of the statute of limitation being one question, and the repeal of the privy acknowledgment of a married woman to conveyances, being another, and a very distinct question; that some members might favor one and oppose the other, and he asked that the question be divided.

Mr. Webb stated his willingness to divide the resolution.

Mr. M. E. Kleberg said: I understand the motion before the house is, as made by Mr. Hill, that the resolution offered by Mr. Webb be referred to the Committee on Jurisprudence and Law Reform. In that connection I desire to say the very question embodied in the resolution were before the committee appointed by the chair on yesterday, and the committee recognized in it such a radical change in the law of this State, as it has heretofore been, that it was thought proper that this and other questions before said committee should be referred to the regular committee, to report upon that question next year, after due deliberation, and I therefore second the motion of Mr. Hill to refer it to the Committee on Jurisprudence and Law Reform.

Judge N. G. Kittrell said: I want to make an amendment that so much of that resolution as favors the repeal of the limitation in favor of married women be referred to the Committee on Jurisprudence and Law Reform, with instructions to report back to this body an act to cover that ground absolutely recommending its repeal, because it has no foundation in philosophy, reason or common sense.

Mr. Hill moved to table the amendment, but upon request the motion was withdrawn, and, the resolution having been divided, the President stated the question before the house was whether or not the statute of limitation applying to married women should be abrogated, and a motion is made to refer that to the Committee on Jurisprudence and Law Reform. The vote taken resulted in the resolution being referred by a vote of 32 to 29.

Mr. Kleberg then moved that so much of the resolution as recommended dispensing with the privy acknowledment of mar-

ried women to conveyances executed by them, be referred to the Committee on Jurisprudence and Law Reform.

A general desire to hear Judge Webb state his reasons for introducing the resolution prevailed, and that gentleman stated, at some length, the reasons which induced him to offer it, and the question was thoroughly discussed, pro and con, by Messrs. Todd, Kittrell, McLeary, Clark and Henderson, after which the motion to refer to the Committee on Jurisprudence and Law Reform was carried by a vote of 38 to 25.

The following resolution, offered by W. L. Prather, was adopted:

Resolved, That the Secretary be instructed to again notify each member of the Association the amount he is in arrears for annual dues, and upon payment of said dues to forward to them a copy of the printed proceedings of this meeting.

Judge Kittrell offered the following resolution, which was referred to the Committee on Jurisprudence and Law Reform:

Resolved, That the statute concerning attachment should be so amended as to authorize such writ to be sued out on affidavit made that the affiant, after due inquiry and investigation, has reason to believe, and does verily believe (then stating the ground on which the writ is sued out), so as to obviate the necessity of making an absolutely positive affidavit, so that the honest and conscientious creditor may have as fair a chance as the professional wrecker to protect his interest and collect his debt.

The annual election of officers for the ensuing year was then had, resulting in the selection of the following: Thomas H. Franklin, of San Antonio, President; Wm. L. Prather, of Waco, Vice-President; Charles S. Morse, of Austin, Secretary; Wm. D. Williams, of Fort Worth, Treasurer.

On motion, the President was authorized to appoint three delegates to the American Bar Association.

W. M. Key and Wm. L. Prather were added to the committee to prepare the bill to be presented to the Legislature, and, on motion, the newly elected President was added to the committee. The committee is as follows: S. C. Padelford, J. C. Crisp, R. Waverly Smith, W. M. Key, Wm. L. Prather and Thos. H. Franklin.

President Padelford appointed Mr. Hume and Mr. Clark to

conduct the newly elected President to the chair, and upon being introduced President Franklin addressed the Association briefly, thanking them for the honor conferred.

Galveston was unanimously selected as the place, and the last Wednesday in July, 1895, as the time for holding the next annual meeting of the Association.

The chairman of the Board of Directors stated that the annual banquet would be spread in the dining rooms of the Beach Hotel, at 9 o'clock p. m.

On motion, the Association adjourned.

CHAS. S. MORSE, SECRETARY.

THIRTEENTH ANNUAL BANQUET

OF THE

TEXAS BAR ASSOCIATION,

GIVEN AT THE

BEACH HOTEL, GALVESTON, TEXAS,

JULY 26, 1894.

Menu.

Sea Turtle, au Madeira

VINO DE PASTO SHERRY

Broiled Speckled Trout, Maitre d'Hotel

Pommes Long Branch

Sliced Tomatoes *Mangoes*

Soft Shell Crabs

Artichauts Vinaigrette

HAUT SAUTERNE, C. & F. F.

Tenderloin of Beef, Larded, a la Chipolet

Potatoes Francis *Mushrooms, Sherry Flavor*

Lamb Chops, Fried, a la Marechale

French Peas

PONTET CANET, C. & F. F.

Spring Chicken, Smothered, en Canope

Asparagus Hollandaise

G. H. MUMM'S EXTRA DRY

WATERMELON

Fresh Shrimp en Mayonaise

Baked Apple Dumplings, Brandy Sauce

Ice Cream Assorted Cake

Fruit Cheese

Cafe Noir

CIGARS

Toasts.

"THE PRESIDENT OF THE UNITED STATES."

RESPONSE BY JUDGE SETH SHEPARD.

"THE TEXAS BAR ASSOCIATION."

RESPONSE BY HON. J. H. McLEARY.

"OUR COURTS OF CIVIL APPEALS."

RESPONSE BY CHIEF JUSTICE B. D. TARLTON.

"THE BAR."

RESPONSE BY W. L. CRAWFORD, ESQ.

"GALVESTON, THE QUEEN OF THE GULF."

RESPONSE BY J. B. STUBBS, ESQ.

"THE LADIES."

RESPONSE BY JUDGE B. R. WEBB.

OFFICERS AND COMMITTEES.

THOS. H. FRANKLIN.....*President*.....San Antonio
WM. L. PRATHER.....*Vice-President*.....Waco
CHAS. S. MORSE.....*Secretary*.....Austin
WM. D. WILLIAMS.....*Treasurer*.....Fort Worth

BOARD OF DIRECTORS.

T. H. Ball.....Huntsville
H. M. Garwood.....Bastrop
J. E. Hill, Sr.....Livingston
A. E. Wilkinson.....Denison
T. J. Ballinger.....Galveston
Wm. L. Prather.....Waco

Committee on Jurisprudence and Law Reform.

Wm. H. Clark.....Dallas
M. E. Kleberg.....Galveston
J. B. Dibrell.....Seguin
S. R. Fisher.....Austin
Eugene Williams.....Waco

Committee on Judicial Administration and Remedial Procedure.

E. B. Perkins.....Greenville
M. A. Spoonts.....Fort Worth
B. R. Webb.....Baird
Jas. A. Baker, Jr.....Houston
A. E. Wilkinson.....Denison

Committee on Legal Education and Admission to the Bar.

J. H. McLeary.....San Antonio
T. F. Harwood.....Gonzales
J. C. Harris.....Galveston
Lewis R. Bryan.....Velasco
D. A. Nunn, Jr.....Crockett

Committee on Commercial Law.

Robt. G. Street.....Galveston
Chas. S. Todd .....Texarkana
W. L. Crawford.....Dallas
T. B. Cochran.....Austin
Reagan Houston.....San Antonio

Committee on Criminal Law.

Norman G. Kittrell.....Houston
Rudolph Kleberg.....Cuero
R. H. Phelps.....La Grange
W. W. Searcy.....Brenham
R. E. L. Knight.....Dallas

Committee on Grievances and Discipline.

Henry C. Coke .....Dallas
J. W. Terry.....Galveston
T. H. Conner.....Eastland
L. F. Chester.....Woodville
H. M. Garwood .....Bastrop

Committee on Deceased Members.

F. Chas. Hume.....Galveston
John G. Winter .....Waco
Chas. S. Morse, Secretary .....Austin

Committee on Publication.

T. B. Cochran .....Austin
Wm. L. Prather.....Waco
Thos. F. West .....Fort Worth
Jas. L. Autry.....Corsicana
T. H. Ball.....Huntsville

Special Committee to prepare Bill.

S. C. Padelford.....Cleburne
J. C. Crisp.....Beeville
R. Waverly Smith .....Galveston
Thos. H. Franklin, President.....San Antonio

Delegates to American Bar Association.

J. Z. H. Scott ..... Galveston
Seth Shepard..... ..... Dallas
Wm. Aubrey ..... San Antonio

[NOTE.—The President of the Association desires that the Chairman of each committee put himself in communication at once with each member of his committee, and that each committee begin without delay to prepare the material for a report. The selection of the committee has been made with the expectation and belief that each member of each committee will not only discharge the full measure of his duty in making a report, but that he will be personally present at the next annual meeting.]

ROLL OF MEMBERS.

Abbott, Jo ..... Hillsboro
Alexander, L. C ..... Waco
Allen, W. H ..... Terrell
Archer, Osceola ..... Austin
Atlee, E. A ..... Laredo
Aubrey, Wm ..... San Antonio
Austin, Wm. T ..... Galveston
Autry, James L ..... Corsicana
Avery, J. M ..... Dallas

Baker, Jas. A., Jr ..... Houston
Ball, F. W ..... Fort Worth
Ball, Robert L ..... Colorado City
Ball T. H ..... Huntsville
Ballinger, Thos. J ..... Galveston
Beall, T. J ..... El Paso
Bidwell, B. G ..... Weatherford
Blake, S. R ..... Bellville
Blair, T. A ..... Waco
Blanding, J. M ..... Corsicana
Bower, E. G ..... Dallas
Brooks, W. S ..... Brazoria
Brotherson, P. C. H ..... Galveston
Brown, T. J ..... Sherman
Brown, W. M ..... Austin
Brown, R. L ..... Austin
Bryan, Lewis R ..... Velasco
Bryant, J. D ..... Richmond
Buckler, C. N ..... El Paso
Burges, W. H ..... Seguin
Burnett, James R ..... Palestine

Callaghan, Bryan ..... San Antonio
Campbell, A. R ..... Galveston
Carleton, Fred ..... Austin
Carrigan, A. H ..... Wichita Falls
Carr, J. S ..... San Antonio
Carswell, R. S ..... Decatur
Carter, A. M ..... Fort Worth
Carter, H. C ..... Del Rio
Cate, M. H ..... Mineola
Cavitt, W. R ..... Bryan
Charlton, Wm ..... Dallas
Chesley, A ..... Bellville
Chester, L. F ..... Woodville
Clark, George ..... Waco
Clark, W. H ..... Dallas
Cline, Henry ..... Houston
Cochran, T. B ..... Austin
Coke, Henry C ..... Dallas
Conner, T. H ..... Eastland
Coughanour, R. D ..... Dallas
Craig, K. R ..... Dallas
Crain, W. H ..... Cuero
Crawford, M. L ..... Dallas
Crawford, W. L ..... Dallas
Crenshaw, Charles ..... Sherman
Crisp, J. C ..... Beeville
Croft, William ..... Corsicana
Culberson, Chas. A ..... Dallas
Cunningham, J. D ..... Kaufman

Davidson, R. V ..... Galveston
Davis, Geo. W ..... Dallas
Davis, L. B ..... Cleburne
Delany, W. S ..... Columbus
Denman, L. G ..... San Antonio
Denson, W. B ..... Galveston
Dennis, Isaac N ..... Wharton
Dibrell, J. B ..... Seguin
Dodd, Thomas W ..... Laredo
Dowell, John ..... Austin
Douglass, W. L ..... Beaumont
Drought, H. P ..... San Antonio

Evans, Chas. I ..... Dallas
Ewing, Presley K ..... Houston

Farrar, L. J ..... Groesbeeck
Finlay, Geo. P ..... Galveston
Fisher, Sam R ..... Austin
Flournoy, W. M ..... Waco
Flood, W. W ..... Wichita Falls
Foard, R. L ..... Columbus
Fontaine, Sidney T ..... Galveston
Ford, T. W ..... Houston
Foster, Arthur C ..... Haskell
Franklin, Thos. H ..... San Antonio
Fulton, Marshall ..... Mason
Fulmore, Z. T ..... Austin
Furman, John M ..... Belton

Gano, W. B ..... Dallas
Gardner, B. H ..... Fairfield
Garrett, C. C ..... Brenham
Garwood, H. M ..... Bastrop
Gibbs, B ..... Dallas
Giles, W. M ..... Mineola
Gilbert, Joseph E ..... Greenville

Goldthwaite, Geo.....Houston
Gould, R. S., Sr.....Austin
Grace, Chas. D.....Bonham
Graham, A. H.....Austin
Granberry, M. C.....Austin
Green, John A.....San Antonio
Green, N. O.....San Antonio
Greene, S. P.....Fort Worth
Gresham, Walter.....Galveston
Grimes, S. F.....Cuero
Groce, G. C.....Waxahachie

Hall, J. M.....Cleburne
Harris, A. J.....Belton
Harris, Edward F.....Galveston
Harris, John Charles.....Galveston
Harris, J. L.....Dallas
Harvey, J. D.....Hempstead
Harwood, T. M.....Gonzales
Harwood, T. F.....Gonzales
Hefley, W. T.....Cameron
Henderson, John N.....Bryan
Henderson, T. S.....Cameron
Henry, John L.....Dallas
Herring, M. D.....Waco
Hill, James E., Sr.....Livingston
Hill, James E., Jr.....Livingston
Hill, R. J.....Austin
Hill, W. L.....Huntsville
Hobby, Edwin.....Houston
Hogsett, J. Y.....Fort Worth
Holmes, H. M.....Mason
Houston, A. W.....San Antonio
Houston, Reagan.....San Antonio
Howard, Russell.....Floresville
Hume, F. Charles.....Galveston
Hunter, Sam J.....Fort Worth
Hurt, J. M.....Dallas
Hutchings, R. M.....Galveston

James, John H.....San Antonio
Jennings, Hyde.....Fort Worth
Jerdone, W. M.....Galveston
Johnson, W. M.....Centreville
Jones, S. W.....Galveston

Kelley, D. A.....Waco
Key, W. M.....Austin
Kilgore, C. B.....Wills Point
King, W. W.....San Antonio
Kirven, O. C.....Fairfield
Kisch, Seymour.....Galveston
Kittrell, N. G.....Houston
Kleberg, M. E.....Galveston
Kleberg, Rudolph.....Cuero
Knight, R. E. L.....Dallas
Kone, Ed. R.....San Marcos

Labatt, H. J.....Galveston
Lane, John.....La Grange
League, W. T.....Lampasas
Ledbetter, W. H.....La Grange
Lee, Charles K.....Galveston
Lessing, W. H.....Waco
Levi, Leo N.....Galveston
Lightfoot, H. W.....Paris
Livermore, A. L.....Houston
Lovett, R. S.....Houston
Looney, F. B.....Oakwoods
Looscan, M.....Houston
Lovejoy, John.....Galveston
Lumpkin, S. H.....Meridian

Malevinsky, M. L.....Galveston
Marshall, Eugene.....Dallas
Martin, Thos. P.....Fort Worth
Masterson, B. T.....Galveston
Mason, George.....Galveston
Matlock, A. L.....Fort Worth
Maxey, T. S.....Austin
Maxey, S. B.....Paris
Mayfield, C. H.....San Antonio
McCampbell, Jno. S.....Corpus Christi
McCormick, A. P.....Dallas
McCormick, George.....Columbus
McDonald, W. L.....Dallas
McKie, W. J.....Corsicana
McKinney, A. T.....Huntsville
McKinnon, A. P.....Hillsboro
McLean, W. P.....Fort Worth
McLeary, J. H.....San Antonio
McLemore, M. C.....Galveston
McNeal, Thomas.....Gonzales
Miller, T. S.....Dallas
Minyard, W. M.....Dallas
Minor, F. D.....Galveston
Montrose, Thomas.....Greenville
Moore, Jno. M.....Fort Worth
Moore, W. F.....Austin
Morris, F. G.....Anstin
Morgan, Richard.....Dallas
Moseley, A. G.....Denison
Mott, M. F.....Galveston

Neal, George D.....Navasota
Newton, S. G.....San Antonio
Nunn, D. A., Jr.....Crockett

O'Brien, Geo. W.....Beaumont
Oliver, W. C.....Houston

Padelford, S. C.....Cleburne
Park, M. C. H.....Waco
Paschal, Geo.....San Antonio
Paschal, Thos. M.....Castroville
Patrick, A. T.....Houston

Perkins, E. B.....Greenville
Pearson, P. E.....Richmond
Perryman, Sam R.....Houston
Phelps, R. H.....La Grange
Plowman, Geo. H.....Dallas
Pope, W. H.....Marshall
Potter, C. L.....Gainesville
Prather, Wm. L.....Waco
Prendergast, A. C.....Waco
Proctor, F. C.....Victoria
Proctor, D. C.....Cuero

Rainey, Anson.....Waxahachie
Randle, E. B.....Fort Worth
Rector, John B.....Austin
Rector, N. A.....Austin
Reese, T. S.....Hempstead
Reaves, S. D.....Tyler
Rice, John H.....Corsicana
Roberts, O. M.....Marble Falls
Robson, W. S.....La Grange
Rogers, R. A.....Fort Worth
Russell, L. B.....Comanche
Russell, T. J.....Beaumont
Rugeley, R. D.....Montague

Sampson, Alex.....Galveston
Sayers, J. D.....Bastrop
Sayles, John.....Abilene
Sayles, Henry.....Abilene
Scott, B. R. A.....Galveston
Scott, J. Z. H.....Galveston
Scott, James C.....Fort Worth
Scott, Sam R.....Marlin
Searcy, W. W.....Brenham
Sebastian, W. P.....Cisco
Sexton, Frank B.....Marshall
Shaw, Gus.....Clarksville
Shaw, W. N.....Houston
Shelley, N. G.....Austin
Shepard, Seth.....Dallas
Shropshire, E. L.....Comanche
Simkins, E. J.....Corsicana
Simkins, W. S.....Dallas
Simpson, Isaac P.....San Antonio
Sims, M. L.....Clarksville
Sinks, Ed. R.....Giddings
Smith, R. W.....Galveston
Smith, T. S.....Hillsboro
Spence, W.....Dallas
Spencer, F. M.....Galveston
Spoonts, M. A.....Fort Worth

Stayton, Robert W.....San Antonio
Stephens, Jno. H.....Vernon
Stewart, Maco.....Galveston
Storey, L. J.....Lockhart
Street, Robert G.....Galveston
Stubbs, James B.....Galveston
Swain, W. J.....Henrietta

Taliaferro, Sinclair.....Houston
Tarlton, B. D.....Fort Worth
Taylor, L. N.....Runnels
Teichmueller, H.....La Grange
Temple, Wm. S.....San Antonio
Terrell, A. W.....Austin (Constantinople)
Terrell, J. O.....Terrell
Terry, J. W.....Galveston
Tackaberry, John.....Hou
Tomkins, Arthur C.....Hempstead
Thomson, Wells.....Columbus
Tod, John G.....Houston
Todd, Geo. T.....Jefferson
Thompson, T. A.....Austin
Terhune, E. W.....Greenville
Tucker, Chas. Fred.....Dallas

Upson, C.....San Antonio

Vernor, Henry E.....San Antonio
Vining, Will L.....Austin

Walker, A. S., Sr.....Austin
Walker, Jno. C.....Galveston
Walker, R. C.....Austin
Watts, A. T.....Dallas
Waul, T. N.....Galveston
Wear, W. C.....Hillsboro
Webb, B. R.....Baird
West, Robert G.....Austin
West, Thos. F.....Fort Worth
Wheless, J. S.....Galveston
White, John P.....Austin
Whitehead, J. P. C.....Tyler
Whitman, M. J.....Rusk
Wilkinson, A. E.....Denison
Williams, Chas. I.....Caldwell
Williams, Eugene.....Waco
Williams, F. A.....Galveston
Williams, Wm. D.....Fort Worth
Willie, A. H.....Galveston
Winter, Jno. G.....Waco
Woods, J. S.....Kaufman
Wooten, Dudley G.....Dallas
Wynne, R. M.....Fort Worth

DECEASED MEMBERS.

ADAMS, Z. T., Kaufman. Died January 9, 1886.
ANDERSON, JAS. M., Waco. Died June 3, 1889.
ANDREWS, A. W., Terrell. Died February 15, 1887.
AUSTIN, WM. J., Denton. Died September 7, 1888.

BASSETT, B. H., Dallas. Died July 15, 1893.
BLEDSOE, D. T., Cleburne. Died July 1, 1893.
BONNER M. H., Tyler. Died November 25, 1883.
BALLINGER, W. P., Galveston. Died January 28, 1888.
BOTTS, W. B., Houston. Died March 7, 1894.
BRADLEY, L. D., Fairfield. Died October 6, 1886.
BRADSHAW, C. J., La Grange. Died June 13, 1888.
BURTS, J. H., Austin. Died January 15, 1894.

CARRINGTON, W. A., Houston. Died July 14, 1892.
CLEVELAND, C. L., Galveston. Died February, 1892.
CROOM, J. L., Jr., Wharton. Died August 2, 1890.

DEVINE, THOS. J., San Antonio. Died March 16, 1890.

FRISBIE, W. H., Groesbeeck. Died September 12, 1883.
FORD, P. C., Cameron. Died December 11, 1893.

GARRETT, N. P., Cameron. Died August 3, 1888.
GIVENS, J. S., Corpus Christi. Died January 20, 1887.
GUINN, R. H., Rusk. Died January 18, 1888.
GOSLING, H. L., Castroville. Died February 21, 1885.

HAGGERTY, J. J., Bellville. Died April 7, 1893.
HANCOCK, JOHN, Austin. Died July 19, 1893.
HILL, GEORGE L., Gainesville. Died July 25, 1887.

JACKSON, A. M., Sr., Austin. Died July 11, 1889.
JACKSON, A. M., Jr., Austin. Died August 17, 1894.
JOHN, A. S., Beaumont. Died February 5, 1889.
JONES, C. ANSON, Houston. Died January 10, 1888.

KILGORE, S. B. Wills Point. Died December 10, 1891.
KENNARD, JNO. R., Anderson. Died October 24, 1884.
KIRK, LAFAYETTE, Brenham. Died July 29, 1893.

LANGUILLE, P. T., Galveston. Died October 14, 1882.
LOGUE, L. J., Columbus. Died May 15, 1884.

MANN, H. K., Galveston. Died December 14, 1888.
MASON, J. R., San Antonio. Died July 29, 1888.
McCOY, JNO. C., Dallas. Died April 30, 1887.
MOORE, GEO. F., Austin. Died August 30, 1883.

NOBLE, S. B., Galveston. Died March 20, 1890.

OCHSE, J. E., San Antonio. Died September 24, 1888.

PECK, L. D., Fairfield. Died May 30, 1885.
PEELER, A. J., Austin. Died November 3, 1886.
PONTON, T. J., Gonzales, Died December 9, 1889.
PRENDERGAST, H. D., Austin. Died November 5, 1886.

QUINAN, GEORGE, Wharton. Died January 25, 1893.

READ, N. C., Corsicana. Died October 25, 1884.
ROBERTSON, JOHN W., Austin. Died June 30, 1892.
ROBERTSON, SAWNIE, Dallas. Died June 21, 1892.
RUCKER, W. T., Belton. Died August 10, 1885.

STAYTON, JOHN W., Victoria. Died July 5, 1894.
STEWART, JOE H., Austin. Died August 14, 1890.
SWEARINGEN, J. T., Brenham. Died August 14, 1890.

TEMPLETON, JOHN D,, Fort Worth. Died April 24, 1893.
TIMMONS, B., La Grange. Died June 17, 1884.
TUCKER, PHILIP C., Galveston. Died July 9, 1894.

WAELDER, JACOB, San Antonio. Died August 28, 1887.
WALKER, RICHARD S., Galveston. Died May 24, 1892.
WALLACE, W. R., Castroville. Died November 12, 1884.
WALTHALL, L. N., San Antonio. Died February 22, 1894.
WARD, P H., San Antonio. Died January 28, 1899.
WEST, CHARLES S , Austin. Died October 23, 1885.
WILKES, F. D., Lampasas. Died November 21, 1886.
WILLSON SAM A., Rusk. Died January 24, 1891.

[NOTE.—The Secretary requests all members to notify him promptly of the death of any member of the Association.]

PRESIDENT'S ANNUAL ADDRESS

DELIVERED BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. S. C. PADELFORD,

PRESIDENT OF THE ASSOCIATION.

Gentlemen of the Texas Bar Association:

The privilege and duty of opening and presiding over the deliberations of the Thirteenth Annual Session of the Texas Bar Association is to me a great pleasure, and I hope that the labors of this meeting will be commensurate with the noble objects of this Association.

Section 1, article 7 of our constitution, provides that:

"The President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice."

I am glad I am relieved of the performance of this duty, for the reason that since our last meeting there have been no changes, noteworthy or otherwise, in the statutory and constitutional laws of this State; and it is a matter of congratulation, that for the past year the legislative temple of Janus has been closed, and we have had a respite from law-making and a surcease of law unmaking. But this calm will not be vouchsafed to us long, for there is being conceived and gestated in the womb-political legislation, the formation and delivery of which will call into requisition, as it has in the past, the best energies and highest patriotism of our profession. It is certainly a source of pride to us when we look back upon the labors of the bar in the past, to discover that to the efforts of the legal profession in the main, is our country indebted for its free government and peaceful and beneficent institutions.

The colonial lawyers, under the leadership of such patriots as Patrick Henry and James Wilson, with the watch-words of "liberty or death," were the moving spirits in the great agitation and conflict which resulted in our severance from the mother country.

The Declaration of Independence, that immortal charter of liberties, is the work of a committee of six, all of whom, except one, were lawyers. More than one-half the members of the convention which framed the Federal constitution were lawyers, and its adoption by the different State conventions was principally due to the lucid and convincing arguments of three great lawyers; which arguments, as collected in the *Federalist*, have ever served as the best interpreter of that instrument. Jefferson and Hamilton, who officiated at the birth of our government, who stood as sponsors for our free institutions, and were the leading spirits in the first administration, formulated and gave caste and character to two theories of government and two constructions of our constitution, which have ever since contended for mastery in the administration of Federal affairs.

Our Federal congress has since its first organization been operated principally under the influence of lawyers, though neither branch of the legislative department of our government had a majority thereof until 1823, since which time no Senate has ever convened without having a majority of members of the bar; and since 1855 the same condition of affairs has existed in the House of Representatives. A majority of the chief magistrates of our nation have been lawyers, and when this exalted position has not been filled by a member of our profession the leading places in the cabinet and the chief advisers of the President were members of the bar.

The Federal judiciary—that silent but most active and potent force in the building up and strengthening the powers and jurisdiction of the Federal government, whether for weal or woe, as a matter of course have been formed exclusively from members of the bar. Substantially the same observation can be made concerning the formation and administration of our State governments, and especially that of our own State.

The bar has been the leading and controlling influence, not only in the active administration of the government, but in moulding the public mind upon all political questions. Public affairs are discussed by the members of our profession from every stump and rostrum in the land, and their speeches and opinions are distributed throughout the whole country and into every household. No political party can long exist without having members of the bar as leaders, even though a part of its creed

may be condemnatory of the profession. No public enterprise of any moment is ever entered upon and perfected without the piloting direction of some member of the bar. No one is considered capable of conducting any business of magnitude without a legal adviser, and no important business engagements are scarcely ever entered into without first having obtained the opinion of a lawyer as to its advisability and legality.

In most of the disputes before the different tribunals, whether the controversy be between individuals, or the individual and his government, or between individuals and States, or States and States, or the State and the Federal government, or between two or more independent nations, each of the contending parties generally calls in some member of the bar to advise them as to their rights, to advocate their cause, and to show the justice of their contentions.

The conservative and just influence of our profession is interwoven as a golden thread through the warp and woof of most all of the varied public and private transactions of our people.

No stone has been laid in the deep foundation of our temple of liberty and justice; nor its strong walls reared; nor its broad and all-sheltering dome raised to the skies, without the aid of the skillful hand and the constructing and directing brain of the bar.

I make the above observations for the purpose of showing the almost unlimited confidence which has been, and is now being, reposed in our profession by the great body of the people, and the reciprocal obligations and duties which this confidence imposes upon us. As to how these duties and obligations have been met and performed in the past is a matter of history, to which we can point with admiration, and as to how they shall be met and performed in the future; how our free institutions shall be preserved and safely steered through the storms which the present portends, is the burning problem of the hour.

If an honorable, a learned, a conservative and a patriotic bar has been the chief builder, preserver and stay of these institutions in the past, can not and will not that same profession be equal to the exigencies of the future?

With the increase of population, wealth and variety of interests, the greater the tension and strain upon these institutions, and the greater the necessity for virtue, ability and patriotism to sustain and uphold them.

One of the main objects of our Association is to uphold the honor and dignity of our profession, and to best fit it for the performance of its duties, and I know of no method better adapted to attain this object than to guard with jealous care the admission

of members to our ranks. The elevation of the standard of our profession, both moral and intellectual, and the prompt riddance by the bar of all unworthy members.

The law of our State controlling the granting of licenses to practice law is very meagre and inadequate; it virtually establishes no standard for admission. The honor and character of the applicant is determined by a certificate of a commissioners' court, and I have never heard of such certificate being withheld. No course or period of legal study is prescribed, and no literary qualification whatever required. The legal qualifications for admission are as varied and diverse as are the opinions of the fifty odd district judges of this State and the committees appointed by them. Generally, examinations for admission are necessarily very unsatisfactory and inadequate, for the reason that the same committee is scarcely ever appointed to examine but one applicant, and the examination falls so close upon the appointment that no time or opportunity is given to the committee to properly prepare themselves to make a suitable examination. Often the examiners are very poorly qualified to make the examination, even if they had the time and leisure to make preparation. The examiners receive no compensation, and consequently the ablest lawyers are too busy and can not afford to lose the time necessary for a proper and thorough preparation to perform the duties of the office; and for this reason the best qualified very often excuse themselves, and consequently the courts are driven to the necessity of selecting one or more of the committee from that part of our profession who have a rather limited experience in the practice, and a meagre knowledge of the fundamental and philosophical principles of the law. I have seen some of the members of these committees who had never attended to an important case on their own responsibility, and who showed by their examinations that they had less knowledge of the law than the applicant himself; and should a committee be qualified and make a thorough examination, and refuse to recommend the applicant for admission, all the applicant has to do is to go to some other district where committees are more lenient, procure his license and return to practice before the same court which had refused him admission.

With my experience of nineteen years at the bar, I can now call to mind but one applicant who failed of admission; but I can readily remember many who should have failed. The bars of other States, and notably that of New York, have recently been agitating the question of a higher and more difficult standard of admission to, and a more thorough and accurate qualification for, the practice of law. The English Inns-of-Court required a stu-

dent, if not a graduate of one of the universities, to be a member of one of these societies for five years, before he was deemed qualified for admission, and only three years if such graduate; thus showing the opinion of the English bar as to the great advantage of literary training to the lawyer.

In this age of free schools and colleges, there is no one of sufficient merit and ambition to become a lawyer who cannot acquire a good literary education, and there is nothing more necessary to aid a lawyer in the varied business which he is now called upon to perform than such literary training; consequently, it would not be amiss, in addition to the high moral character and well-grounded knowledge of the fundamentals of the law, to require some literary standard for admission to the bar.

A bill prepared by the Bar Association of New York provides for three examiners for the whole State, who are to be appointed by the Court of Appeals, the highest judicial tribunal of that State, the standard and qualification for admission and the rule governing the examinations are to be prescribed and fixed by this court. Thus this proposed law places the responsibility upon this court of fixing the standard, which can be raised or lowered, as shall be deemed best by the court. While all may not agree that this is the best method of accomplishing the desired end, yet it is an effort in the right direction.

Another method of upholding the honor of our profession and making it more effective in accomplishing the objects for which the necessities of society created it, is for the bar of this State to take more interest in the meetings of this Association. There should be an attendance upon these meetings of four or five hundred lawyers, representing the various and different localities in this State. A small number, representing a few cities, though ever so able and zealous, are not capable of interesting the remainder of the bar, much less the whole people of this State in a great many of the needed and beneficial reforms which are discussed at our meetings. But if a majority of the profession, or at least several hundred of them, would attend these meetings and unite in the efforts to accomplish the many worthy public objects which are discussed and advocated at our different meetings, no influence could prevent their accomplishment. The moral and intellectual influence of a united bar cannot be withstood by an opposing force, when directed to the accomplishment of some needed reform.

The effect of full attendance upon these meetings would beget a cordial intercourse amongst us; the clash of opinion and interchange of thought would brighten our minds; we would obtain a broader and loftier view of our duties; appreciate more fully

the obligations resting upon us; the intellectual and moral standard of our profession would be elevated, and these ennobling influences and priceless benefits would be distributed and disseminated throughout the whole State, and the bar would thus become fully adequate to the obligations resting upon it.

There is no ground for fearing that our Association will create what may be termed a corporate or guildish spirit, and thus sever us from that close connection and sympathy by which we are so indissolubly bound to the great body of the people, and make us a profession apart from all others. Our profession can never become a caste or distinct class, for it is not handed down from father to son, but is supplied by recruits fresh from every calling and occupation; and further, our business relations bring us in contact and close association with all.

The above suggestions are submitted for your consideration.

Some Reflections on the Relations of Capital and Labor.

ANNUAL ADDRESS

DELIVERED BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. B. D. TARLTON,

CHIEF JUSTICE OF THE COURT OF CIVIL APPEALS AT FORT WORTH.

Mr. President and Gentlemen of the Texas Bar Association:

We may be said to be passing through an era of gloomy prophecy. As a basis for such predictions emphasis is laid upon the alleged facts that the industrial world is divided into hostile camps, and that society is on the verge of an "irrepressible conflict" between capital and labor.

It is claimed that by partisan methods, involving bribery and corruption, the ballot is defiled; that by a system of unequal land tenure the agricultural classes are oppressed; that by an unsound financial system a plutocracy is reared, begetting a condition to terminate in the enslavement of the wage earner or in war.

Nor are these sinister forebodings confined to persons of our country. European publicists, such as Macaulay in England, and the Count de Maistre in France, have expressed great distrust in the stability of our institutions.

The concentration of capital on the one hand, the sporadic ebullitions, whether of unreasonable resentment or of just protest by the laboring class, on the other hand, lend speciousness to the forecasts. We may not, therefore, treat the situation derisively nor flippantly; though while I see in it reason for appre-

hension and precaution, I perceive no ground for despair nor even for discouragement.

Time will vindicate the encomium of the statesman-philanthropist, Gladstone, that "the American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

The period presenting these features of portent and menace will be found to be a transition period in our history, from which the common sense conservatism and patriotism of our people will evolve renewed life and prosperity by the application of established principles of government to new conditions.

Looking calmly and dispassionately at our economic condition, I am disposed to think that with that tendency to exaggeration which seems to characterize the ardent though honest temperament of the reformer, its hues have been too darkly drawn.

The comforts, to say nothing of the luxuries of life, have been brought by the hand of advancing civilization to the door of every householder in the land.

For centuries past the history of society is a story of constantly accelerating progress, and during that period there has been a proportionate increase in the earnings of labor.

"In England," says a recent contributor, "from 1688 to 1800, there was an increase of less than 50 per cent. in the number of laborers, and an increase of 610 per cent. in their total earnings, and from 1800 to 1883 workers increased a little over 400 per cent., and their income about 600 per cent. Wages have risen both in amount and in purchasing power. The hours of labor have become fewer, and the rate of mortality has decreased.

"Taken as a whole, the working classes of the United Kingdom may be said to be stronger in physique, better educated, with more time at their command, in the enjoyment of greater political rights, in a more healthful relation toward their employers, receiving higher wages, and better able to effect some savings in 1884 than they were in 1857, and in England the conditions are less favorable to the laboring classes than in some other countries, far less favorable than they are in our own. It is densely populated; it imports much of its food; nearly all the land is owned by a few thousand families; its workmen have been crippled and dwarfed by laws made in the interest of employers.

"In the United States it is plain that there is no gulf between the very rich and the very poor, but a gradation of widely distributed wealth. More than eight million families are land owners, and of the thirteen million families, among whom the wealth of the country is divided, eleven million are said to belong to the wage-earning class."

The wife of the artisan of to-day, in mediocre circumstances, may garb herself in finer linen, and contemplate the reflection of her beauty in a mirror of finer polish and workmanship, and repose upon softer cushions than Queen Elizabeth in the zenith of her power; and her husband can command infinitely more of comfort and of luxury than could Dudley or Essex, who shone among the courtiers of that proud queen.

These reflections are indulged, not for the purpose of showing that the wage earner should be content with his present condition, nor of showing that this condition is free from unjust inequalities, but for the purpose of refuting the oft-repeated assertion, so often invoked by the apostles of social revolution, that "the poor are getting poorer," and for the purpose of showing the wisdom of being content with "making haste slowly." No method can be devised by which we will be enabled to plunge headlong into millennial peace and plenty.

It must be conceded, I think, that in many instances the laboring man is the victim of oppressive conditions; and in his struggles to free himself from these, by peaceable, though energetic methods, having due regard to the social order, he is entitled to the sympathy of every humane and patriotic heart.

In considering any question, it is rarely amiss to have recourse to its history, for the purpose of arriving at a true conception of its present status and of reaching a correct solution in regard to it.

Our present industrial condition (it has been remarked) is to be ascribed, not so much to an abrupt change, as to a gradual and logical outgrowth or evolution from previous conditions. In the light of history its genesis has been thus substantially indicated:

The ancient civilizations had culminated in the splendor of the Roman empire. This, in its turn, succumbed to the invasion of the hordes of northern barbarians, who laid waste the palaces, the cities and the fair fields of Italy and of Southern Europe.

Charlemagne, upon the ruins of the old, sought but failed to establish a new and a stable empire. His failure was followed by the establishment of the feudal system, in which the few were lords, spiritual or temporal, as the case might be, and the masses were peasants, churls, serfs or villains, their class designation yet serving as a synonym for shame and ignominy. The feudal system collapsed in the impoverishment of the knights and barons, due to feuds and wars and to the crusades—to the growth of the burghers or of the mercantile class, in the development of trade and commerce—to the invention of gun-powder, and of the printing press—to the discovery of America, and to the religious revolution of the sixteenth century.

Subsequently Francis Bacon, that marvelous compound of moral infirmity and God-like intellect, taught, in the Novum Organum, a new philosophy dethroning the systems of Plato and Aristotle.

The results of this philosophy are thus portrayed in the splendid diction of Macaulay: "It has lengthened life; it has mitigated pain; it has extinguished diseases; it has increased the fertility of the soil; it has given new securities to the mariner; it has furnished new arms to the warrior; it has spanned our great rivers and estuaries with bridges of form unknown to our fathers; it has guided the thunderbolt innocuously from heaven to earth; it has lighted up the night with the splendor of the day; it has extended the range of human vision; it has multiplied the power of the human muscles; it has accelerated motion; it has annihilated distance; it has facilitated intercourse, correspondence, all friendly offices, all dispatch of business; it has enabled man to descend to the depths of the sea, to soar into the air, to penetrate securely into the noxious recesses of the earth, to traverse the land in cars which whirl along without horses, and the ocean in ships which run ten knots an hour against the wind. These are but a part of its fruits and of its first fruits. It is a philosophy which never rests, which has never attained, which is never perfect. Its law is progress. A point which yesterday was invisible is its goal to-day, and will be its starting point to-morrow."

The contrivances due to the inventive genius of man, working under the inspiration of this philosophy, transformed the industrial system by the substitution of mechanical for human labor. It, at the same time, however, required the services of "armies" of men where "squads" had previously sufficed. The stage coach lines, with their individual directors and operatives, yielded to the vast systems of railway transportation under corporate management, demanding the labor of thousands, distributed according to the requirements of departmental service. The master mechanic, with his workshop and his small number of apprentices or journeymen, was substituted by the factory, also under corporate management. As a consequence there was on the one hand an accumulation and a massing of capital for the management of these vast corporate enterprises, and on the other hand the field of industry was incalculably extended. The problem of capital (in the solution of which it has been successful) was to secure labor at the lowest price; the problem of labor (in solving which it has met with but meager success) has been to secure employment at the highest price. Thus we find these two factors of our national wealth, prosperity and greatness ar-

rayed in hostile attitudes—the combination of wealth into corporations, syndicates and trusts on the one side, being met by a combination of thousands of men on the other side, subordinating their intelligence and their wills to the control and dictatorship of leaders in many instances impetuous, untrained, taking insufficient heed of the vast power with which they are intrusted, reckless, if not dishonest.

It must be confessed, however, that the discontent of the wage earner is not without cause. In its dealings with him capital has manifested a disposition to ignore all ethical considerations, and to regard him rather as a part of the inanimate machinery used by him in his labors than as a human being invested with the rights and dignity of American citizenship. The question with the capitalist is not whether the "laborer is worthy of his hire," but, "How can I, co-operating, if need be, with other interests similarly situated, so shape conditions as to realize the greatest amount of labor for the smallest amount of money?"

It is the rule of self-applying the philosophy of the materialist: "Every door is barred with gold, and opens to a golden key." Protest and remonstrance are met with the rejoinder: "Business is business. Here are the terms of the contract; accept or reject it as you like." The statement is made with the full knowledge on the part of the employer that the situation is such as to coerce an acceptance of the terms, how hard soever they may be.

The injunction, "Thou shalt love thy neighbor as thyself," is frequently dwelt upon to point a Sunday-school lesson, or for the purpose of enabling a popular preacher to decorate a sermon, but it has no place in fixing the actual relations of capital and labor. Indeed, if there invoked, it would be regarded as much in the nature of an anomaly, if not of an anachronism.

The situation finds illustration in an incident of which I once read, in which an elephant and the fowls of a barnyard were actors. The elephant with stately pose and dignified mien, walked into a barnyard with numbers of chickens in his path, and as he went he unctuously remarked: "Each one for himself and God for us all." The chickens fluttered off in rapid consternation, deeply sensible that there was in the situation a large element of elephant and a very small element of providential beneficence. Do we not find here an illustration of the "laissez-faire" theory in its unalloyed form?

Prior to the war of 1861, while abolition leaders were declaiming against the barbarities of the slave system of the South, the writers of the latter section made frequent truthfully recriminating reference to the inhumanity of the factory system; to the

"lengthened hours of labor, the intermingling of the sexes, the meager compensation, the neglect of all sanitary conditions."

Meanwhile, while such is the industrial status of the wage-earner, what is his political attitude? A contrast by him of the two conditions must serve but to increase his discontent.

During the period of the evolution of our industrial system to which I have alluded, a French prelate was intrusted with the education of a prince royal. According to an English historian and essayist, this teacher, in instructing his pupil with reference to the discharge of the duties awaiting him, startled the nations with the astounding proposition that the purpose of human government was the service of the masses, and that "twenty millions of people were not created for the gratification of one man."

The practical application of this doctrine was held in abeyance probably by the death of the pupil prince; but after the lapse of a century or more it found its solemn and more extended expression in the immortal charter of American freedom. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their first powers from the consent of the governed."

To this standard of government the "tribes of men" seem to be reaching, so that it has been truly said that the hope of humanity is in a democracy, conservative, enlightened, just.

Consonantly with these principles of government, the wage earner recognizes the fact that in the race of life he is entitled to the same opportunities with the capitalist, unhampered by discriminations due to artificial and inequitable conditions. This recognition is intensified by the effects of the universal education which now obtains. It is impossible to adorn and enrich the intellect of the laboring man with the beauties of literature and the treasures of science and expect him to rest content with factitious and tyrannical social and economic environments. Political freedom and intellectual enlightenment may not co-exist with economic servitude.

Acknowledging a just cause of complaint on the part of labor, and avowing a sympathy with it in all of its struggles peaceably conducted for amelioration, and its consequent reach toward a higher civilization, we are brought to consider the methods proposed and such as may be expedient for the attainment of its purpose.

Discarding as unworthy of consideration the gospel of hate

preached by the anarchist, with its reliance upon dynamite and the dagger of the assassin, the means most generally advocated for social regeneration consist in the teachings of the "new socialism," as it is called, and of the doctrines of Henry George, the apostle of the single tax theory. We have no reason to question the sincerity or the ability of the authors of these several theories, but they are susceptible, I think, of successful refutation.

In England the doctrines of socialism have taken such hold as to find advocates and promoters among persons of influence and cultivation.

A recent writer, warning the liberal party in England against the encroachments of socialism, defines it as a system contemplating "the annihilation of private capital, the management of all industrial production and distribution by the State, when government shall be the sole farmer, manufacturer, carrier and storekeeper, and when we shall all be turned into civil servants under the control and in the pay of the ministry of the day."

The fundamental proposition on which this system is founded, announced first by Ricardo and repeated by Marx, is that labor is the sole source of value, and that the existence of capital is therefore unjustifiable.

It has been pertinently suggested that, conceding the truth of this proposition, the collectivism of Marx follows logically, for if labor alone produce value, private capital becomes spoliation and the products of labor should be removed from the control of individuals and subjected to collective distribution.

It has also been pointed out that the proposition, however, is fallacious, in that its supporters overlook the effect of economy as a source of value equally as productive as industry itself, and that the result of this economy, which result the economist alone is entitled to appropriate, is but another name for capital; that they further fail to differentiate quality and quantity in the consideration of labor; that they ignore the truth that labor is only valuable because of the social service to which its product may be applied; that the sole standard of its value is its fruit; that, in and of itself, it is without value; that work, however energetically performed, which results in nothing serviceable, is but an "idle beating of the wind."

Again, the forcible argument has been presented that if, in accordance with the socialistic scheme, the entire wealth of the people of this republic were divided, the distribution would result in the allotment of a sum not exceeding $5000 to each family; that the family would not be expected "to lay aside for a rainy day" any portion of this sum, for this would be equivalent

to the hoarding of capital, the existence of which is reprobated by the theory; that if the principal sum should be invested at reasonable interest, the result would be less than $1 a day for a family of an average size.

Considered politically, the system contemplates the election of officers to whom should be intrusted the "entire economic management of society." Human nature, whether in a garb of a democrat, a republican or a socialist, is much the same. Power so widespread and all-penetrating is alluring and dangerous. The adoption of such a regime would inaugurate an era of "bossism" intensified. It would seem that the scheme of the socialist should be dismissed as in no sense roseate with the promise of a brighter day; as, indeed, unworthy of serious consideration but for the superior order of intelligence in which it finds advocacy.

At this juncture I deem it proper to refer briefly to the theory of taxation which Mr. Henry George has created. This theory has attracted such extended and favorable attention from intelligent sources that it demands more extended notice than I am prepared to give to it. It has been properly described as a "phase of socialism," and it may be added, a growing phase. Where socialism aims to transfer all property to the State, the purpose or effect of Mr. George's system is to transfer to the latter simply the title in fee to all realty, where it is contended that in a moral sense it has always rested.

The fundamental proposition of the system denies to the individual man the right of ownership in land. It concedes to him the bare possessory right. The individual is morally entitled to own, as absolute master, only the results of human labor. God, not man, was the creator of land, the title to which should rest exclusively in the community, just as do the light of the sun, the wind of the heavens, the water of the ocean. The improvements, however, put upon the land as the result of the occupant's labor, become the property of the latter. The occupant, therefore, is but a tenant of the State, and the rental, called the tax due by him to his landlord, and payable upon the land, exclusive of improvements, should constitute the "single tax" imposed, and, sufficient as it would be for the support of the government, should be the sole source of its revenue.

The "root principle" of this system impresses me as fallacious. It involves a confusion of land, an object susceptible of occupancy, with that which is not; which is unstable, and which, indeed, is without form, if not void; overlooking the obvious distinction that upon the former man may expend labor, which in a sense shall become a part thereof, whereas, as regards the ele-

ments last named, man may indeed labor with or by means of them, but not upon them so as to add to them.

A, B, C and D see a tract of vacant and unoccupied land. The three first named, all consenting, occupy it in severalty. D engages in the business of selling the products for them, on a commission, to a foreign population. In the bare fact of the cultivation and the labor involved, the land, formerly barren, is become fertile, so that its fruitfulness, the product of the labor bestowed upon it, is become a part of the soil itself. D having accumulated wealth by means of thrift and enterprise employed in his mercantile pursuit, purchases from each of the remaining three a portion of the land thus occupied and cultivated. Can it be said that D, who thus converts and transforms the products of his labor into land, secures no title, but merely a possessory right therein?

An affirmative answer would, it seems to me, involve a conclusion both ethically and logically unsound. The right of private ownership in land has, prior to the generation of Mr. George, been, I believe, of uniform and universal acceptance by "civilized man." Where, in any domain of thought or speculation, some assert and some deny the truth of a given proposition, it follows that fallacy and error somewhere exist. But where a given proposition purporting to be the statement of an affirmative truth, has met with the uniform and universal sanction of enlightened mankind, the conclusion may well be drawn that the proposition is correct.

The right of private ownership in land marks the development of man from the tribal to the national condition. The love of country is inseparably connected with the love of the soil, not as a thing of mere transitory and possessory right, but as a place for permanent abode, where the family, the "unit of society," is to be found and to grow, with its sweet and bitter experiences—with the prattle of childhood, the charm of youth, the maturity and strength of manhood.

We have in Texas what is known as the homestead system. While this system, as it is, perhaps possesses some features of excessiveness, these can be easily pruned by prudent legislation. The system rests upon the relation of debtor and creditor founded by God himself, and existing between the father and the members of the family. It was wisely designed to place the helpless members of the family, who, according to the decrees of nature itself, stand toward the father in the relation of privileged creditors, beyond the reach of penury, distress and domestic calamity. It secures the "glorious privilege of being independent." It leads to the formation of sound and stable citizenship, and the

consequent integrity of the commonwealth. The theory of Mr. George is at war with this system and with its beneficial effects in denying that which is its basis, the right of private ownership in land.

Passing from the consideration of schemes which contemplate a total or a partial revolution of the social system, it is perhaps proper to advert to a method suggested, and known as the "co-operative and profit-sharing plan." By this, it is proposed to institute a species of partnership between the employer and the enploye, and by securing a community, or a limited identity of interest, to avoid the cause of contention.

The advocates of this system claim that in Europe, especially in England, it has passed beyond the experimental stage, and that signal success has attended its operations. In our own country, the system has been organized into an "Association for the Promotion of Profit Sharing," with the United States Commissioner of Labor as its president. Should its results justify its general adoption, it would quite successfully solve this embarrassing question.

It is believed that the remedy sometimes applied by organized labor in the guise of "strikes" and "boycotts" may be pronounced futile. This conclusion is reached without considering the moral or legal right to resort to these methods. If, as is probably frequently the case, a real grievance be the cause of resort to the one or the other, the violence and widespread distress and the direful consequences which ordinarily accompany them, hide from the public view the ethical nature of the grievance.

If the strike should be purely "ideal," and if, during its pendency, the striker, following the suggestion of Governor Peck, should "go a-fishing," reasonable complaint could not, as a rule, be urged against the movement. But observation leads to the conclusion that the ways of the strike are not the ways of peace. As a consequence, the good will of public opinion is alienated from a cause ofttimes just, and the strike ends without a reparation of the mischief which it was intended to remove, and with the strain of relations intensified between the contending parties. It will be remembered that the great majority of the people belong neither to the ranks of capital nor of the wage earners, in the strict sense of that term. They are not directly parties to the strife, but they are intensely affected by it. By the ties of commerce, the citizen of Galveston is bound to the citizen of Chicago, for instance, by an affinity so close, as under our organic law, to overleap State lines. A wound inflicted upon commerce in the city of Chicago may be regarded as having been inflicted elsewhere, because it is perhaps felt

in every other city and State in the Union. It visits calamity upon enterprises, and untold inconvenience upon households in every part of the land. By indulging in strikes and the consequent outbursts of violence, the wage earner estranges the sympathy and the good opinion of the public. The leaders of labor organizations, instead of counseling measures fraught with strife, confusion, destruction of property and of life, should, where they exist, expose to the public gaze and detestation the cruelties and pitiless exactions and hardships to which the wage earner is subjected. Where the laws are adequate, they should seek redress through the courts; where inadequate, they should seek remedial legislation, appealing in both instances to the powerful and indispensable influence of public opinion. It will be remembered that the source of public opinion—the great body of the American people—is impartial and unprejudiced with reference to the equities of the issue. Under such circumstances, the instinctive desire of humanity is to render justice as between contending parties. This is especially true of the American people. The number and quality of the eleemosynary institutions of this country indicate a keen and tender compassion for those afflicted with physical infirmities, and an intense desire to mitigate their sufferings. The same sympathy, if properly invoked, will be extended to the unfortunate of every kind and class, from whatsoever source the misfortune may arise. Nor let it be said that the remedy suggested is an abstraction. It molds and modifies human government; it detects and redresses human grievances. It traverses seas, and absorbs and co-ordinates with itself the sympathies and aid of foreign people. It moves with the force of armies, and, if need be, marshals them upon the point of attack. It struck the shackles from the arms of four millions of domestic slaves; it can, and properly aroused, it will strike them from the arms of millions of industrial slaves.

We are thus brought to consider certain phases of the legal status, as well as the scope of legislation which may be enacted, affecting the relations of capital and labor. An admitted, and perhaps the most overwhelming enormity affecting industrial and commercial enterprise, is what is known as the "trust." I need not dwell upon the nature and operations of this manifestation of modern monopoly—this commercial Polyphemus.

"Monstrum horrendum, informe et ingens."

I need not detail nor emphasize the methods, now bold, now insidious, by which it absorbs and thus stifles all competitive manufacturing enterprises, by which it parcels out commercial territory, usurping exclusive control and practical ownership thereof, by which it enters legislative halls and seeks to cor-

rupt the fount of governmental life. The performance of such a task has been adequately anticipated by others. Thus, in an able paper read by the Hon. U. M. Rose before the American Bar Association at its meeting in 1893, on the subject "Strikes and Trusts," that learned gentleman quotes from the great jurist, Mr. Cooley, as follows:

"A few things may be said of trusts without danger of mistake. They are things to be feared. They antagonize a leading and most valuable principle of industrial life in their attempt not to curb competition merely, but to put an end to it. The course of the leading trusts of the country has been such as to emphasize the fear of them. . . . Where we witness the utterly heartless manner in which trusts sometimes have closed manufactories and turned men willing to be industrious into the streets in order that they may increase profits already reasonably large, we can not help asking ourselves whether the trust, as we see it, is not a public enemy; whether it is not teaching the laborer dangerous lessons; whether it is not helping to breed anarchy."

As a result of the operations of the trust may it not be said that an unreasonable depression of wages necessarily follows?

To destroy the trust the congressional act of 1890 was passed.

Where public officials are lax in the discharge of their duties, would it not be well that organized labor should lend the powerful aid of its influence in the enforcement of this statute, instead (as in some instances seems to be the case) of doing the bidding at the ballot-box of the manipulators of the trust by voting to perpetuate the abnormal systems which sustains it? Would not such action be far more effective than the futile and fallacious means of the "strike" and the "boycott," bringing in their train commercial stagnation, violence, bloodshed and widespread calamity?

The recent decision in the case of the Farmers' Loan and Trust Company vs. Northern Pacific Railroad, reported in Vol. 60, page 803, Fed. Rep., by Mr. Circuit Judge Jenkins, is suggestive of a resort to the equity powers of the courts as a remedy to some extent effective in settling the points of contention between capital and labor.

This decision has been the subject of extended comment, and of congressional investigation even, on account of its alleged interference with the enjoyment of the personal rights of the citizen.

By it the court perpetuated an injunction issued at the instance of the receivers of the company named, and against the employes of the receivers, "the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen and all persons, associations and combinations, voluntary or otherwise, whether employes of said receivers or not, and all persons generally."

The scope of this restraining order is very wide. Among other matters it enjoins the defendants from "so quitting the service of the receivers, with or without notice, as to prevent or hinder the operation of said railroad; and from combining or conspiring, or as committees, or as officers of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroads operated by said receivers, or any of them, to join in a strike."

In this instance, it is true, the property concerned was directly within the custody of the court. But the language of the opinion indicates that without reference to this fact the restraining relief would have been extended. The ground of the opinion is that the threatened action enjoined was the result of a "combination and conspiracy." "If," says the court, "the combination and conspiracy alleged, and the acts threatened to be done in pursuance thereof, are unlawful, it can not, I think, be successfully denied that restraint by injunction is the appropriate remedy. The threatened interference with the operations of the railway, if carried into effect, would result in paralysis of its business, stopping the commerce ebbing and flowing through seven States of the Union, working incaculable injury to the property, and causing great public privation. If this conspiracy had proven effective by the failure of the court to issue its preventive writ, this vast property would have been paralyzed in its operation, the wheels of an active commerce would have ceased to revolve, many portions of seven States would have been shut off in the midst of winter from the necessary supply of clothing, food and fuel, the mails of the United States would have been stopped, and the general business of seven States and the commerce of the whole country passing over the railway would have been suspended for an indefinite time."

In support of the decision the learned judge cites precedent in the following language: "Was such a conspiracy unlawful? So long ago as 1821 Judge Gibson, that judge of great and enduring reputation, in the case of Com. vs. Carlisle Brightley, N. P., 36, (the case of a combination of employers to depress the wages of journeymen by artificial means) declared that a combination is criminal when the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates."

I refer to this opinion of Mr. Justice Jenkins neither to commend nor to condemn it, but because, granting its soundness, it seems to justify the following conclusion: If, at the instance of capital, equity may so far extend its arm as to restrain a free American citizen from so quitting the service of a corporation

with or without notice, as to prevent or hinder the operation of the corporation, because such quitting is the result of a conspiracy or combination looking to the destruction of private property or the inauguration of public calamity, the same power should, at the instance of labor, interpose to prevent the consummation of capitalistic combination or conspiracy to depress wages to the "oppression of the wage earner."

If a contract entered into with apparent freedom by the wage earner be yet the result of a moral duress or coercion due to conditions resulting from combinations or conspiracies on the part of capital, to resist which the laborer is as helpless as was ever the negro slave with the overseer's lash lifted above his back, will not equity relieve against the enforcement of such a contract? Equity, while not at liberty to ignore precedent, yet rises to meet and solve emergency.

With reference to the scope of legislation which may be resorted to in connection with the question, I quote from an address by Mr. Justice Brown, of our Federal Supreme Court, before the American Bar Association, at its meeting of 1893, on a cognate subject, "The Distribution of Property."

This address includes an able discussion of several phases of the question here presented. The language referred to is as follows: "I am by no means satisfied that the old maxim that the country which is governed least is governed best, may not, in these days of monopolies and combinations, be subject to revision."

I do not think that the time will ever come when the maxim will cease to be wise. The word "least," however, is relative in character, and we can not imagine that conditions will so absolutely fix themselves as to enable us to reach a standard by which the maxim may be inflexibly applied. In other words, the maximum of government under certain conditions would be the minimum under others.

The language quoted indicates, therefore, a conclusion probably justified by present industrial conditions, that the sphere of legislative interference in economic concerns may have to be extended within limits once considered paternalistic. "Paternalism" has been rightly described as "a word to conjure with." And wherever it can be properly applied to legislative action, such action should be condemned, for the end of government is public protection, not private nourishment.

For reasons above indicated, however, legislation which would, under conditions prevailing in the time of Thomas Jefferson, have been properly regarded as governmental usurpation, might, under present conditions, be ofttimes viewed as reasonable pro-

tection. In other words, is not the test of proper and adequate legislation to be determined by considering what under given conditions is, within constitutional limits, justly expedient—the just expediency to be fixed with reference to that which will best secure society in the enjoyment of life, liberty and the pursuit of happiness, exacting in many instances that "individualism" shall yield?

Must all considerations yield to the behests of "individualism" and of extreme non-interference in the affairs, for instance, of corporate concerns, and this under economic conditions in which the identity of the individual is wholly absorbed by corporate existence—in which, indeed, whether under corporate management he orders or obeys, he is become to all intents and purposes as insensate and mechanical as the different parts of the machine which he may guide or operate?

As illustrative in this connection, I read in the *American Law Review*, for May and June, 1894, the following quotation from a contributor to *Donahoe's Magazine:*

"'God! Why do you preach to me of God? I tell you there is no God for the poor—no heaven. There is no hell except this life. No devil except the man who grinds the lives of women and children into dollars and cents.' The above denunciation was hurled at me with vindictive, accusing force by a poor, emaciated woman whom I found during my investigation of wage-earners and their condition, in a garret room under the shadow of the Brooklyn bridge, where, by the sickly glimmer of a coal oil lamp, she was making double-stitch seamed overalls for four cents a pair. By her side sat a pinch-faced, big-eyed child of four years, who, by sewing the buttons on the overalls, enabled her mother to earn $3.75 in a week of ninety-eight hours, or fourteen hours a day, seven days a week. This is but one of the many cases that came under my observation, and by no means the worst."

In the presence of such a picture it would be difficult fo preserve an air of decorous composure. The editor of the *Review* quite pertinently suggests "the pregnant question" whether "it is beyond the office of government to interfere for the purpose of mitigating the sufferings above described?" The task would seem to be to so shape legislation as to leave in the several departments of industrial life the free operation of the natural law of supply and demand, thus allowing energy, thrift and intelligence to reap their just reward. To accomplish this result it would, perhaps, necessarily happen that legislation in smiting inequitable conditions arising out of combination and conspiracy and affecting vast numbers of people, would require interference with

business-relations. These views (if they may be called such) are presented with the consciousness that they are but a gleaning in a field already quite extensively if not thoroughly cultivated.

They are submitted in a spirit rather of inquiry than of assertion, of reflection rather than of argument. But, whether they suggest a line of legislation, correct as a golden mean between the extremes of individualism and of socialism, or false as partaking of reprehensible paternalism, I have yet every confidence in the ultimate just solution by the American people of this problem. We may traverse the rural portion of our country, inhabited by the great mass of our people. Fields smiling with the promise of bounteous crops meet our admiring gaze. Houses comfortable and inhabited by people to whom the gaunt forms of penury, hunger and distress are strangers, dot these fields. These people are the yeomanry of the land. They believe in the maintenance of the social order and the supremacy of the law. They will prove to be the source of the preservation of American institutions.

Nor may I conclude this paper without a word of complacency at the condition of our own State. Under the influence of legislation often criticised and condemned as paternalistic, our State, in an ara of disturbance elsewhere prevailing, enjoys a condition of social and economic security, and presents a field where capital and labor, with little friction, alike work to the glory of the commonwealth. True to the nature of the noble science of the law, our profession will contribute its portion to the peaceful and conservative solution of the issue between these forces. It will enter sympathetically into the struggles of our common humanity, all of which tend to the development of a higher civilization. The cause of justice, as administered under our first chief justice and since, and under him, in whose untimely death the bar of our State has felt a loss as of a personal friend, has been in the spirit of the question put by the ancient commentator: "Quorsum enim sacrae leges inventae sunt nisi ut suum cuique jus tribuatur?"

Our civil conduct thus guided, regard will be had alike for capital and for labor, for the wife of the millionaire and for the sad-eyed widow who in patience plies her needle for a living.

THE STATUTORY CRAZE.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. E. B. PERKINS,

OF THE GREENVILLE BAR.

Mr. President and Gentlemen of the Texas Bar Association:

Among modern governments Great Britain has had the longest successful existence. Its monarchical form, of course, does not coincide with our views. Still, applying to it the tests of benefit to its citizenship, and the extension and prosperity of its imperial domain, it stands without a rival. Among its most important features has been its development of the science of law. In this it demands our careful study and in most respects our cordial approval. This development has progressed slowly, but in the right direction. Most of it has been accomplished by the decisions of the various courts of the realm. They have announced and elucidated certain fundamental principles, until thereby has been established what is called a common law and also an equity jurisprudence. During this growth and development some things were incorporated in these decisions that, as time passed, became objectionable; and if the courts failed to eliminate such objectionable features, the legislative power interfered and passed a statute, simple in its construction and verbiage, but which would remedy the evil. These statutes seldom went into detail. They were always promptly accepted by the courts, which would construe the enactment and determine its bearing upon existing principles and practices, and thereby each became a nucleus around which clustered an immense amount of legal lore. By this process these statutory enactments were in effect absorbed into the common law and equity jurisprudence.

The founders of our government had been educated in the English school. They were thoroughly imbued with the great principles upon which was based the English judicial system, and they promulgated our Federal and State constitutions. The principles incorporated therein were drawn from that source and were pointedly and tersely expressed. The early statutes, which were enacted under these constitutions, were not elaborate. They settled the problems of social intercourse in a few brief sentences. Evidently the men who promulgated these constitutions, and passed these statutes, recognized the fact of the existence of the principles of the common law and equity in this country, and intended that they should be administered by the courts. They must have assumed that the courts were learned in these principles, and did not think that it was necessary to their establishment that they should be incorporated in the statutes. In fact the basic principles of all law are not very numerous. An accurate, abstract statement of them would not occupy much space, but the combinations of facts which arise in the social relations are without number. Not only is this true, but no two of these combinations are ever the same. They may be similar, and to the casual observer may appear to be identical, but trace them out in their various ramifications and connections, and you always find a material divergence.

The difficulty in the administration of the law is not in understanding its principles, but in applying these principles to the peculiar state of facts presented. This difficulty is never absent; it is patent to the observation of every one, whether they are especially skilled in the legal science or not. The "code maker" was the natural product of this condition. Originally he was somewhat versed in the science of law. His intentions were good, but like most men with a special theory, he became enthused upon the subject and believed that he could eliminate all existing difficulties by his code. You have observed that the American people believe in "near cuts." They patronize the "patent medicine man" who has a panacea for every ill, until they make him a millionaire. They will listen to anything, however absurd, that proposes to shorten the processes which have been used during the past. So the code maker was hailed as the benefactor of mankind. He was extolled as the enemy of the law's delay, a John-the-Baptist, who could make straight its paths; a friend of the people who should deliver them from the "Old Man of the Sea," that had been fastened about their necks for so many ages. And the original code maker accomplished much that was commendable, but, like all reformers, he was unable to control the movement he had started. He might say

thus far and no farther you shall go, but the human current started in that direction would pay no heed to a warning by him or any one else. Again, he was followed by a horde of imitators whose follies have almost obscured the good which was originally accomplished. In later years these so-called reformers have not made any pretense to the study of law as a science. The veriest mountebank and charlatan has now no hesitancy in setting himself up as the man who can point out the defects in this, the greatest of all sciences, and adjust the intricacies of its machinery, so that the same will work without friction. Any disorder that arises he claims to be able to diagnose and prescribe for. His prescriptions may seem simple enough, but usually when they are administered the disorder is intensified or others are produced. He is not deterred by this, however, but as the trouble increases, he simply increases the number of his prescriptions, making each fuller of details and more elaborate in its construction than its predecessor.

There is one thing, however, that is common to all these prescriptions—one sovereign remedy that is never absent. It is like Dr. Salgrado's bleeding. If the disease would yield to nothing else, the doctor said "bleed." If a disease of the body politic can not be cured otherwise, our political doctor says: "Create another office and fill it with a discreet officer, having power to act as he may think best. Put him at the head of a bureau with a large number of under-officials to procure data and statistics, and make reports, and investigations, and incur expense, as well as draw their salaries." If a suggestion is made that all this will increase the burden of taxation, the reformer at once proceeds to search out new sources of taxation, most of which new sources, when traced back to their real fountain head, which is unseen by the reformer, are found to simply be an increased burden upon the labor of the country. The laborer and the property owner may complain at this; the conservative stay-at-home may differ with this theory, but the great army of office seekers indorse the "reform," and hail it with satisfaction as the dawning of a new era in our national progress.

These reforms usually present themselves as special hobbies by certain individuals. The object of the "rider" is usually to reach a certain office, and he has no special interest in the hobby. In fact, it may get into disrepute and be ignominiously thrown aside, and then oftentimes a singular thing occurs. The day after it is laid away in its little grave, by the side of the political highway, the man who originally "broke it to ride" will be seen mounted upon another, "brand new," paint not dry, just from the reform factory, and will be heard crying aloud to the people: "Follow

me; this is the road that leads to the haven of rest for you." Strange to say, the people will often look at the new hobby and not at the old humbug who is riding it, and will follow, cheering him to the echo.

Thus the good work goes on from campaign to campaign, and the result of it all is to be found in the files of the "acts of the legislatures" of the various states. Take a number of them and examine them. They are graveyards filled largely with cripples, monstrosities and shadows. They get so bad that it is necessary to have them "revised" at least every ten years. The product of this revision, known usually as "revised statutes," is simply a sort of patchwork "resurrection." Its character depends largely upon the ability and tact of the resurrectionist. Too often he is of the old-time type of "graveyard man," with a spade, dark lantern and a jug of—water. He goes into the legislative graveyard and begins at the first grave, dumping its contents into a chapter with little reverence and less care. If a limb or two is left in the rubbish, or even a vertebra of the spinal column remains imbedded in the mud, it is of little consequence to him. Frequently it might be just as well if the whole were lost, for when the compilation is completed, there is no reason for feeling proud at the advance that has been made in the legal science, if it is to be taken as the finished product of the superior wisdom of the nineteenth century. Instead of simplifying the law these statutes, by their details, their ambiguities, their omissions, their contradictory provisions, and their general obscurity, only serve to increase and multiply its uncertainties. Where there was certainty, and fixed and established rules and principles, which had been so for a long number of years, these statutes frequently present a new theory and a new condition, which of necessity must be settled and determined by the courts. The result is that the courts and the lawyers are required to delve in this muddle of statutory enactment and try, by construction, to bring order out of chaos. In doing this, however, they must accept the express provisions and declarations of the legislative will, which are oftentimes in two different statutes, found to be almost, if not entirely, irreconcilable. The natural result of all this medley is protracted and extensive litigation, which is burdensome to the litigants and to the people at large, seeing which the masses complain at the courts and the lawyers on account of the obscurity of the law and uncertainty in the result of litigation, when the truth is that the courts and the lawyers are wholly irresponsible for the situation, and in fact their labors would have been much lightened if it had not been for the blunders of the legislative department of the government. Our statutory enactments,

even when revised, are becoming more and more difficult to master. Take, for example, the revised civil statutes of our own State. We find them composed of 5000 articles, covering more than 700 large pages. Then add to this the sheet acts of the legislature that have been issued since the revision, which of themselves would make another large volume, and you begin to get an idea of the difficulty presented to one who would undertake to analyze and determine their provisions. This difficulty is intensified when we note the fact that almost every article, other than those which are purely formal, requires judicial construction to make its provisions perfectly clear. Frequently such a construction is necessary for different subdivisions and paragraphs of a single article. Occasionally the courts will find it necessary to modify a former construction. This will present to the student one article of a statute, the whole of which was to have been simplicity itself, together with anywhere from one to twenty judicial decisions construing it, as a problem to master, in order to understand its purport. When we remember that these constructions and controversies and difficulties may and have run through a large number of provisions of our statutes, we are more and more impressed with the futility of such legislation, and such revisions as we have heretofore had. This is especially annoying when it is patent to every one that all the statutes which we have, properly expressed and qualified, might have been, and might yet be, stated in perhaps one-fourth of the space they now occupy.

This is not only true as to Texas, but also as to the legislation of other States, and that passed by the Federal congress. Any one who has had reason to examine the acts passed by the latter has been struck with the crudeness of construction and ambiguity of meaning contained therein. There is no apparent reason why this should be true. The body being selected by such large constituencies and its sessions being practically without limit, we would suppose that a bill introduced therein and perfected into a law by the slow process employed, would at least be certain as to what was intended, but the reverse is true. Why it is so I would not undertake to say. One thing every one must recognize, however, and that is that the present condition of uncertainty in legislative enactments should not exist. But is there a practical remedy for it? A remedy might be suggested, though it is extremely doubtful if it could be secured in the present condition of public opinion. A revision of the laws, which is simply a compilation of existing statutory enactments, clearly will not remedy or remove the trouble. In fact, it will only tend to perpetuate the present objectionable state of affairs.

What we need is a remedy that will be of permanent value. Could not this result be accomplished by recognizing the full force and effect of the principle of common law and equity, and then passing such statutes modifying the same as are necessary to meet our peculiar conditions and form of government? These statutes could be stated in a clear, concise and simple way. They need not be numerous. We have examples of such in our old enactments, such as the statute of frauds, the limitations on common carriers, registration acts, etc. In addition to this, our practice acts should be recast, shortened and modified. When this was done, these portions of our law could remain without change for a long period of time. If properly done, any change should be opposed except after the most mature and deliberate consideration by the ablest jurists of the country, not men who are simply alleged to be jurists, but those who are in fact familiar with the law as a science, and who are capable of appreciating in some measure the probable effects of a change.

I would not be understood as proposing to debar all other callings than that of law from participating in legislation. I believe in all classes being represented in the legislative bodies of the land. Even the man who owes his popularity to his ability to tell a good story, or to the warmth with which he can shake hands, or the bitterness with which he can denounce the other fellow, ought sometimes to be elected, but, when he is, he should confine his efforts in originating legislation to that for which he is best adapted. But when changes and modifications of the principles of law which affect the rights of persons and property are proposed, the opinion of those men who are the best capable of determining this effect should be heard and followed. This would only be applying the ordinary rules of conduct in other matters to legislation. For in other affairs we who are not expert therein listen to and are guided by those who are. Above all let the gentlemen who are making a study of law be chary of the way in which they attack old, well established principles. The medical student when he first begins to experiment with powders and pills and surgical instruments does not often undertake to overthrow and defy well-known principles of that science, and if he does, he probably succeeds in killing a few people, and finds himself denounced by the solid, cultivated and thinking men of his profession. The young theologian usually follows the regular beaten paths, and when he departs therefrom and makes an assault on some of the fundamental principles of Christianity, he is ordinarily buried out of sight beneath the anathemas of the theological world. The planter perfects his education in that calling in the open fields, and if he does not,

and proposes to adopt certain methods which have long since been found by his co-laborers to be foolish, he makes himself the laughing stock of the agriculturists. Yet in legal enactments we have things presented and urged year after year that every lawyer knows would be of incalculable injury to the country if placed upon its statute books as law. And just here is often presented a cause of complaint against the legal profession. When such enactments are proposed, the lawyers of the country pay but little attention to them, and take no trouble to expose their fallacies. This can not be said to be because the people will not listen to them, for an overwhelming majority are not only willing but anxious to hear the opinion of a reputable lawyer upon a subject peculiarly within the scope of his professional learning. Why they do not give it more frequently and freely can not be definitely determined. Some perhaps are too busy, others are disinclined to political controversy, while the great mass doubtless thinks if it becomes a law the people will soon tire of it and repeal it. This is not as it should be. Those who know and understand the legal principles which are essential to the preservation of the rights of the people should, when those principles are attacked, make an open defense of them, and wage an unrelenting war upon those who are leading the attack. Patriotism and the common interest of humanity demand that this should be done. If it were done, the result would be apparent in a very short time.

That which has heretofore been said is not intended as a reflection upon the intelligence or intentions of the great majority of the legislators, because objectionable legislation does not usually originate with them, but is the result of public opinion and public pressure. The trouble therefore arises from the misdirection of public opinion, and from its misconception of the causes of the evils that pertain to the law. Heretofore the public has been educated to believe that the remedy for any evil in this regard was the promulgation of a statute that should go into minute details in regulating the evil or supposed evil that was to be corrected. So that now when a trouble arises, whether it be a difference about the management of a public free school, or a financial panic that paralyzes the commerce of the world, the first thing that is proposed is to correct, control and regulate it by an act of the legislature. So long as this idea prevails the present "obscurity" of the law will remain with us. Therefore any movement looking to the correction of existing evils must begin by informing the people of the true reason. We have heretofore heard of "campaigns of education." The most beneficial education that could be given the American voter would be to let him

thoroughly understand the wisdom of the old-time common law and equity jurisprudence which has been in process of formation for hundreds of years, and which has been developed by the labors of the most learned men that have graced the annals of English and American history.

It is not needful to call the roll of these illustrious men. The first of them appear back where the history of the English speaking people merges into tradition and fable. Thence, as the race grew and spread its dominion over the world, their influence grew and permeated the civilization established by that people. They have been the philosophers of the race, who, tireless, ceaseless, have toiled to hold aloft the truths of legal rights and wrongs until all men might learn and understand. They have been the priests of liberty, who, through the shadows and sunshine of the ages, have watched and preserved its sacred fires on the altars of humanity. They have been the gladiators, who, in the arena of thought, have always stood ready to do battle with the minions of tyranny and oppression. Surely it should be a labor of love to us, who are heirs to all the wealth they have left to the world, to stand guard for a little while over this treasure and to exhibit its value to mankind and man. Will we do it faithfully? If we will, there will be less evil and more good, less poverty and more happiness, less oppression and more liberty, and man's progress will be guided onward and upward to that perfection which has ever been the dream of the philosopher, the priest, the jurist and the statesman.

MEDICAL JURISPRUDENCE.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. ROBERT G. STREET,

OF THE GALVESTON BAR.

Mr. President and Gentlemen of the Texas Bar Association:

It is a common reproach that we live in an age given over to materialism, and it is probably true that ours is not an age distinguished by high ideals or a lofty, speculative philosophy. With respect to our own country, it has been said on high authority that a government founded on the theory of rights, and not duties, must inevitably tend to materialism. If, indeed, our part of the work of civilization be a lowly one, all the more may we look for consolation to the compensations that have been vouchsafed us. And if the age we live in may not soar aloft on the wings of song and eloquence; may not give to the world works of art of imperishable beauty, or heroes of undying renown; may not dwell in rapt contemplation over the mysteries of life and death; yet, if it has made the two blades of grass to grow where but one grew before, if prohibited the realms of speculative philosophy, it has sought refuge in an earnest and reverent study of nature and her laws and in sincere and devoted scientific investigation, it may be said of this age, like ships that pass in the night, it had its message to deliver, which, if rightly understood, shall enure to the well-being of mankind. It should be remembered that it is not given to any people at all times to move forward *pari passu* in the several avenues of human progress that make up the sum of an advancing civilization. All improvements affecting the well-being of our race, whether in the principles of government, or its administration, or in the external or

material conditions of individual life, or in the mental and moral growth of the component elements of society, are essential parts of what is called civilization. Yet it has rarely happened that a country has advanced at the same moment in all these respects. Indeed, it seems an inseparable penalty that signal activity in any one of the three elements should be coincident with a decadence and desuetude in one or both the others. Thus, while the Rights of Man were being proclaimed by the French Republic, it was accompanied by such defects of governmental administration and such vicious social conditions as blinded even the liberty loving Burke to its message of freedom.

When Herbert Spencer (to have produced whom is such an honor to the age as refutes all indiscriminate depreciation) was returning to England from a short visit to our country, responding to the kind sentiments of our countrymen, he said, "You will have to go backward before you can go forward again," meaning, doubtless, that our ethical and esthetic progress had not kept pace with our material development, and that we would have to stop in the latter direction to catch up in the former for symmetrical development. This age is distinguished from all that have preceded it by a more direct and successful application of scientific truth to practical purposes. The moment the investigations of science lead to the discovery of a fact or a principle, art, under the impulse and guidance of self-interest, appropriates and converts it to some profitable use. Thus is society benefited by these triumphs of scientific research, which, in a less active social state, might for a series of years have had no higher result than to confer honor on the minds by which they had been achieved.

Just fifty years ago Morse found it impracticable to enlist private capital in the magnetic telegraph, and only after long and anxious waiting obtained the meagre appropriation of $30,000 to construct the short line from Washington to Baltimore. Now, Edison, and many others, can command all the capital they require to put into practical use any scientific discovery and invention they propose. The only struggle is to get in on the ground floor. So far have we departed from the idea of the ancients, who deemed philosophic and scientific truth vulgarized by their application to the uses of man, that now we esteem them valuable only in proportion to their adaptation to his wants. We are entering, too, in our own country, under proposed tariff legislation, upon a period of our political history when we may confidently expect an increasing removal of restrictions upon the enterprise of individuals that will open boundless fields for exertion, and afford freer opportunity for that spirit of the age that

tends to unite the labors of science and the arts in the improvement of the social and intellectual condition of mankind.

Jurisprudence lays under contribution for its own improvement every advance in scientific knowledge, but in no branch of the law is so great an improvement due to scientific investigation as in Medical Jurisprudence. Here scientific truth has not, indeed, been laid under contribution by the industrial arts, but by that science itself which is charged with the regulation of the rights, duties and liabilities of individuals in their relation to each other and to society.

An enumeration of some of the correlated topics will satisfy as to the great extent of this field of labor: Mental Unsoundness, considered in its relation to the execution of wills and contracts, and to criminal responsibility; its psychological consideration embracing the psychical, somatic and intermediate theories of its origin; the marks that distinguish it from Remorse, Anger, Shame, Grief, Home-sickness, Fear and Simulated Insanity; the development of its relation to physical disorders, as in the Deaf and Dumb, the Blind and Epileptic, and in cases of Somnolentia and Somnambulism; as affecting the temperament with Depression, Hypochondria, Melancholia and Hysteria; as affecting the moral sense generally, and especially as in Homicidal Mania, Kleptomania, Erotomania, Fanatico-mania and Politico-mania, and as classified into Idiotcy, Imbecility and Dementia; Toxicology and herein of Irritant and Narcotic Poisons, their physical evidences and chemical tests; Pregnancy, Delivery and Infanticide; Sexual Disability and Sterility; Rape, Wounds, Burns and Scalds; Starvation; Suicidal and Homicidal Strangulation; Hanging; Drowning; the Doctrine of Survivorship; Malingering; Life Insurance and Medical Expert Testimony.

The relation of medical science to jurisprudence is embraced under the law of evidence, and from the earliest period of civilization there are traces showing the resort to medical science in the administration of the law. The Roman law referred all medical questions arising in legal examinations to the "authority of the learned Hippocrates." It was not, however, until the beginning of the present century that Medical Jurisprudence, or Forensic Medicine, as it is sometimes called, began to be recognized as an important and special branch of study. The advance of medicine itself, as a science, was long postponed by the religious superstition that all disease was a special visitation from an overruling power, and hence to be dealt with by the priesthood, to whom it was exclusively committed. They, with characteristic jealousy of the power it gave them, long successfully guarded against invasion. Notably, two subjects in medicine,

of widest application to jurisprudence, have only assumed scientific aspect since the beginning of the nineteenth century. I refer to Toxicology and Mental Unsoundness.

The most important accessions to the science of legal medicine in recent times are those derived from the study of mental diseases, and the application of the knowledge thus obtained to determining questions of legal responsibility; and from investigations into the nature and effect of poisons, and the mode of detecting their presence in the human body. It is true that the most deadly poisons seem to have been known to the ancient Greeks, Romans, Arabians and Hindoos, most of which are unknown at the present day, but it is only in the present century that the pharmaceutical chemist has discovered the active principle of poisons. Until the end of the last century, but little attention was given insanity by physicians, still less by psychologists. The insane were considered outcasts, possessed of devils, incurable, and not objects of tenderness, because deemed insensible to its ministrations. Their treatment was barbarous in the extreme. In New England, they were let out to those who would agree to support them for the least sum, and when gentle were allowed to roam at large, and when violent were chained in stables. Asylums, as reformatory and hygienic institutions, were unknown. It is one of those humiliating confessions science must sometimes make that it was not until the madness of George III. that the conscience of mankind revolted at this treatment. Here was indeed a conjuncture, one ruling by Divine right, and at the same time given over to the devil. And about the same time the American revolution settled the question of Divine right for all ages, mental unsoundness first came to be pathologically considered and treated.

Medico-psychology has engrafted on the law of homicide almost universally in the States of this Union the recognition that a mind blurred by insane predispositions, and disturbed by nervous excitement, is incapable of that intellectual premeditation required to convict of murder in the first degree. A distinction, it is believed, not yet recognized in England, where the barbarous adjustment of penalty to crime has so long shocked the conscience of mankind. To the same source is due the dissipation of the common error, so long indulged and persistently maintained, of the existence of a condition termed moral insanity, or moral depravity, as a disease in which the mind is not affected. Psychology has established that the moral and mental functions are so inseparable that one can not be insane without involving the other. Moral insanity, properly distinguished from insane, irresistible impulse, transitory mania and occult insanity, has, psychologically, no existence.

A still more difficult error to combat, however, is the widely-spread belief in the independent existence of specific manias, of which kleptomania furnishes a good example, without the mental or moral functions of the individual being otherwise in any manner affected. All reasoning that refutes the existence of moral insanity is *a fortiori*, applicable to disprove the theory of specific and independent manias. Insanity is a pathological condition of the mind; that its manifestations may be *almost* exclusively in a particular direction in a given instance is not denied, but the mind as a whole is diseased, and I venture the assertion that never yet has one afflicted with a so-called specific mania, other than homicidal, been guilty of a homicide, but that counsel for the defense in that close, intimate and searching investigation that lays bare to him all the domestic life of the accused, has found other evidences of insanity than those pertaining to the specific mania only.

In the first year of our century the first lecture on the Legal Medicine was delivered in Great Britain, at Edinburg, and as early as 1804, lectures were also delivered at Columbia College. Its study is now recognized as essential in the medical department of all institutions of learning of the first class in this country, in Great Britain and Continental Europe.

Chemistry is the branch of medical science which has been laid under largest contribution by the law. With respect to chemistry it has been well said: "It has contributed as much to the progress of society and done as much to augment the comforts and conveniencies of life, and to increase the power and the resources of mankind as all the other sciences put together." The distinction it has attained is not the less remarkable because it had its origin in the superstitious belief in the possibility of transmuting baser metals into gold, of curing all diseases, and indefinitely prolonging human life. The law, especially in cases involving toxicological investigation, is deeply its debtor.

It would be most interesting to dwell upon many of the subjects indicated above, particularly mental unsoundness, toxicology and medical expert testimony, but the minuteness and accuracy required to make their treatment instructive does not consist with the general summary here proposed.

All lawyers in general practice must be case lawyers when a case arises involving questions in medical jurisprudence. But it is a vulgar and wide-spread error to treat contemptuously the results of scientific medical investigation, and too often the appeal to the jury to disregard medical expert testimony and take what the advocate is pleased to call a common sense view of the matter under examination, is but a cover for his own ignorance. While

we must, of necessity in such cases, be case lawyers, there is no reason why we should not be thorough, for the learned writers on the subject have placed the means of knowledge within easy reach of the legal mind trained to accurate reasoning and close analysis. It seems even puerile to be deterred by the technical terms in which this knowledge is often necessarily clothed, for we ourselves know that a terminology is indispensable to accurate scientific expression; moreover, the increasing practice in all cases of difficulty and importance of employing a competent medical expert for the advantage of consultation, even where it is not contemplated to place him on the witness stand, is highly to be commended.

Medical science will continue her triumphant career undismayed by ignorance, undeterred by fear; political agitation or discord are no impediments in her onward march. As rapidly as her triumphs are achieved they are written down in all languages, and treasured up in the thousands of places of safety that no deluge of vandalism can destroy. Nor has she anything to fear from dissension within. Such trials as she shall be subjected to are as but the crucible of her own chemists, and shall tend to strengthen and purify in proportion to their intensity.

I would say to the votaries of medical science, there are also votaries of legal science, on the bench and at the bar who, disdaining demagoguism, stand ever ready, with an eagerness equal to that of the industrial arts, to appropriate the very truths of their labors; they, too, in the future as in the past, will be triumphant in that race which is not always to the swift, in that battle which is always to the strong.

And who shall say that that age which uplifts countless millions from the level of brutes, to which they were theretofore condemned by accepted social and governmental doctrines, and makes of them self-respecting men and women, that places the means of subsistence, of education and comparative comfort within the reach of those who labor, that alleviates human suffering and advances the abministration of justice, is inferior to one glowing with the fires of religious zeal, rapt in the contemplation of the mysteries of the Immaculate Conception, the Trinity, and the origin of the world, or that ponders in ascetic meditation over the perfectibility of the human race?

The Legal Profession, Its Value, Importance and Influence.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

JUDGE EDWIN HOBBY,

OF THE HOUSTON BAR.

Mr. President and Gentlemen of the Texas Bar Association:

I appear before you to-day in response to the invitation of your committee, with many apprehensions as to my ability to satisfactorily discharge the duty assigned me, but prompted, I assure you, by a sincere desire to contribute at least to the entertainment of the Association, if not to its substantial advancement, if I may be able to do so, through the medium of this brief paper.

Although it affords me pleasure to comply with the request of your committee, I experience no little embarrassment when I realize that I am confronted by as able and intellectual an audience as ever excited the fears or stimulated the ambition of the speaker.

This embarrassment, however, and these apprehensions, are much allayed, when I remember that in proportion to the capacity of the profession for critical analysis and instantaneous detection of error, is its liberal judgment and general forbearance.

While the law affords a vast variety of topics appropriate to this occasion, I have encountered no little difficulty in the selection of one which has not already formed the subject matter of able papers, and received, at the hands of eminent members of the National and State Bar Associations, elaborate treatment.

Assignments; bankruptcy; the codification of the laws; our statutory action of tresspass to try title, together with our laws

regulating the rights of the survivor, under our community system; the wise, the beneficent, homestead exemption, with the intricate questions the practical application of this law have given rise to; limitation and numerous questions growing out of the judicial construction of both National and State constitutions, have each afforded fruitful topics of discussion, and have constituted the subject matter of well-considered papers before this and other similar law associations. Desiring to avoid taxing you with a repetition of that which has been much better said by others, I have, in preference to any of the subjects above named, deemed it best to submit a few thoughts generally for your consideration, touching the law as a science, together with its study and practice, its importance and influence.

I do not exaggerate, I think, when I say that no science is so vast, intricate and comprehensive as that of "jurisprudence." And I have long since entertained the opinion, founded upon careful observations, that the members of the legal profession, who understand and reverence it, are unquestionably the most dauntless champions of the principles of civil liberty, and are the most fearless advocates of individual rights to be found among men. I believe if the legal profession in this age was extinguished, that would contribute more to the enslavement of the human race than all the armies of all the nations.

Jurisprudence, in its largest sense, may be said to compass every human transaction, and in its practical details measures every human duty. It can not be surpassed in dignity, when we contemplate the lofty subjects it embraces. It searches into and expounds the elements of morals and ethics and the eternal law of nature, as illustrated, by the eternal law of revelation. It is in this same sense that law has constituted the panegyric of philosophers and sages in every age; it is in this sense that it has been apostrophized, as

> "Sovereign law, the State collected will
> O'er thrones and globes elate,
> Sits empress, crowning good, repressing ill."

While its dignity may be lessened when we regard law, in its more restricted sense, as a system of regulations adopted for the safety and harmony of civil society; as the means of administering public and private justice; as the code by which rights are obtained and wrongs are redressed; by which contracts are interpreted, property secured, and the institutions which add strength to the government and domestic happiness to life, still its design will appear sufficiently grand, and its practice and administration sufficiently difficult to rank law as the most exalted of institutions in its value, importance and influence upon mankind.

By the "law" I mean the "common law" as it now exists, abrogated or modified, by our National and State legislation. The history of the common law may be divided into three great epochs. The first, extending from the reign of William the Conqueror to the reformation. The second, from the reign of Elizabeth to the revolution which placed the house of Brunswick on the throne. The third, including the period which has elapsed from that down to the present time.

The first of these embrace the origin and establishment of the feudal system, with all its curious and barbarous appendages. Its seizeins, its aids, its reliefs, its escheats, its wardships, its fines upon marriages, its alienations, and its chivalric services, etc. Connected with these were the establishment of tribunals of justice, administered first by judges in Eyre, and afterwards by the courts at Westminster; the introduction of assizes and writs of entry, and the perfecting of all those forms of remedies by which rights are enforced and wrongs redressed.

While much of the law of that age is now generally obsolete, it can not be denied that it is rich with the treasures of knowledge, and even in our day supplies the foundation in many cases on which to build a solid fabric of argument, and no one ever explored its depths, long and difficult though they be, without receiving instruction fully proportioned to his labor. The second epoch is rendered remarkable by the enactment of two statutes which have contributed largely to change the condition of real property.

I allude to the statutes of "wills and uses" in the reign of Henry the Eighth. The former has crowded our books with cases more numerous and difficult in obstruction than any branch of the law. The latter, followed by the statute of Elizabeth of "charitable uses," is believed by many to have laid the foundation of that comprehensive judicature in which equity administers, through its searching interrogatories addressed to the consciences of men, the most beneficent principles of justice.

The modern structure of trusts, diversified, as it is, by marriage settlements, terms to raise portions or pay debts, contingent and springing appointments resulting, and implied uses and trusts, grew out of this statute and the constructions put upon it.

Two statutes, equally remarkable, adorned the second period. The statute securing the writ of habeas corpus and that abolishing the burdensome tenures of the feudal law. These were the triumphs of free inquiry and sound reason over the dictates of oppression and ignorance. They gave lustre to an age disgraced by the brutal Jeffries, and scarcely redeemed by the purity of Lord Hale. Under the guidance of the great Bacon the business

of chancery assumed a regular course, and his ordinances continue at this day to be the polar star which directs the practice of that court.

The third period embraces the introduction of the principles of the commercial law, and their successful application to the exposition of contracts, of bills of exchange, promissory notes, bills of lading, charter parties, and policies of insurance It was in this epoch that Lord Mansfield ingrafted into the common law the maxims of maritime jurisprudence.

The doctrines of courts of equity, during this period, attained a high degree of perfection through the learning and research of Lord Hardwicke, by whom the scattered fragments were combined into a scientific system, and a broader line marked the boundaries between common law and chancery.

In speaking of the law, Judge Story says: "I do not magnify its value when I express the deliberate opinion that there is not within the compass of human attainment any science having so strong a tendency to strengthen the understanding, enlarge its powers, sharpen its sagacity and form habits of accurate discrimination."

Says Sir James McIntosh: "More understanding has in this manner, perhaps, been exerted to fix the rules of life than any other science, and it is certainly the most honorable occupation of the mind, because it is the most subservient to the general safety and comfort."

"Law is the science in which the greatest powers of the understanding are applied to the greatest number of facts," is the language of Dr. Johnson.

Burke, whom Macaulay ranks as the greatest orator of ancient or modern times, says that it is the first and greatest of human sciences, one which does more to quicken and invigorate the understanding than all other kinds of learning put together.

There is no occasion whatever to appeal to the testimony of the sages of the past in view of our own knowledge of the importance, value and influence of the law.

It requires but slight reflection upon the vast variety of subjects and the almost infinite diversity of human transactions to which the law applies, and but a casual consideration of the astuteness and skill which characterizes the profession, and which are essential to detect and guard against the contrivances of fraud, the indiscretions of folly, the caprices of the wise, the errors of the rash, and the confidence of the ignorant, to afford ample proof of the fact that in the administration and practice of the law, the highest faculties of the mind are called into requisition.

In addition to this, when we remember that jurisprudence is a science which has resulted from, and is the outgrowth of, the successive efforts of many minds of many ages; that its rudiments sink deep into antiquity, and its branches extend wide into every generation; that it seeks to measure the future by approximations to certainty derived solely from the experiences of the past; that it must continue to be in a state of progress or change, to adapt itself to the multiplicity of social exigencies; when this is remembered, it will not be a source of surprise to the thoughtful, that the best efforts of genius are necessary to keep pace with the demands of its practice; and that the closest application and best powers are taxed in its administration. From its nature and objects, the common-law employs a severe and scrutinizing logic. In some of its branches it is compelled to deal with metaphysical subtleties and abstractions peculiar to the depth of intellectual philosophy, and from this cause it has sometimes been in danger of enslavement by scholastic refinements; it narrowly escaped this character of shipwreck at the hands of the Sophists of the middle ages, and was almost extinguished by the intricacies of the Feudal System of the Conqueror.

If the common law had not necessarily dealt with substances instead of shadows, with the business, rights and inheritances of men, it might have shared the fate, or justify the satire pronounced upon metaphysical inquiries, "that those who have attempted to sound its depths, in that unfathomable gulf were drowned."

But common sense has at all times powerfully counteracted the tendency to undue speculation in the common law, and silently brought back its votaries to that which is the end of all true logic, the just application of principles to the actual practical affairs of human life.

Some of the fictions and reasoning in support of these principles we find occasionally interwoven through the systems of the common law in the past, are calculated to surprise and amuse us in the present age. We are gravely informed by Bracton, who is followed by Lord Coke, that the true reason why, by the common law, the father could not inherit real estate from the son, is that "inheritances are heavy and *descend*, as it were, by the law of gravitation, and can not *ascend*."

These and a few similar blemishes have had the tendency to sharpen the edge of sarcasm on the profession, and to subject it to the assaults of the visionary critic; but there can be no question that the common law follows out its principles with a reasoning so close and irresistible that it approaches as near as any artificial or moral deduction can to the certainty of demonstra-

tion. It can not be otherwise. It is not employed in the silence of the monastery or the seclusion of private life.

Every cause is tried in the presence of men whom practice and profound study have made singularly acute and discriminating. The advocate is not only stimulated by the hope of reward and devotion to his client, but by laudable love of fame, to exert all his talents to detect fallacies and answer objections. It does not devolve on him nor is he at liberty from mere courtesy, or for private respect, or popular feeling, to conceal the blunders or suppress the inconsistencies of his adversary. On such occasions and at such places the law expects every man to do his duty. He is required to search the dark, explore the weak, elucidate the doubtful and confirm the strong points of his cause as its exigencies may need. In such contests victory is rarely won without an arduous struggle. Fanciful analogies, set phrases, eloquent expression and plausible statements will not do. They are but shadows, or mists, hovering over the pathway to truth, but do not impede it. These may mislead the novice or betray the ignorant, but they do not deceive the experienced practitioner. There must be a firmer and closer grapple with realities. The contest is for men of strong power and deep thoughts, and such men have been in all ages foremost in the ranks of the bar, and eager for its distinction.

There are more exalted reasons for the practice of law than the profit it promises. In the structure of our institutions there is much which demands the thoughtful vigilance of the laudably ambitious and the truly patriotic.

Our government is in all its branches a government of the people. It purports to be a government of laws and not of men, and yet more than any other government it is subject to the control of public opinion. Its efficiency and its security depend upon the intelligence, independence, virtue and moderation of the people. It can be preserved no longer than a reverence for settled, uniform laws characterizes the conduct of the people. There can be no freedom where there is no safety to property, no protection for personal rights. Whenever litigation renders the rightful possession of property or its legitimate enjoyment precarious, whenever it impairs the obligations and sanctity of lawful contracts, or restricts personal liberty, or compels a surrender of personal privileges upon any pretext, plausible or otherwise, it matters not whether this is the result of the lawless mob or the pen of the despot; in either case it is the essence of tyranny. It matters not what are the causes, whether brought on by a spirit of innovation, or popular delusion, or State necessity, it is still irresponsible power against right, and it is the more to be dreaded

when it has the sanction of numbers, because it is the less capable of being resisted or evaded. At such times the majority prevails, by mere numbers, and not by force of judgment.

The American lawyer has many political duties to perform, and his activity is constantly demanded for the preservation of the public interest. He should watch the exercise of power in every department of the government and ascertain if it be within the prescribed limits of the constitution, and he should study deeply and thoroughly the elements which compose that grand instrument—elements which were the slow results of genius and patriotism predicated upon the largest views of human experience. The reason on which every part of this superb governmental foundation is built should be carefully examined and accurately weighed. Slight inconveniencies are not to overturn them, nor should they be undermined by trivial objections. It is not to be expected that the best system of laws and the best governments are without defects. Whatever is human is necessarily imperfect, whatever is practical necessarily deviates from theory. It has been said by a profound thinker and statesman that the abstract perfection of a government with reference to natural rights may be its practical defect. By having a right to do everything men may want everything.

Great vigilance, therefore, devolves on our profession to guard against the alluring theories of the modern political would-be reformer. Governments are not always destroyed, or their efficiency impaired, by direct assaults. But they are weakened by the approaches of insidious foes. No profession can as successfully resist such enemies as the legal profession. The hereditary sovereign and nobility in a monarchy are generally instructed with the superintendence of legislation. But in a republic, every citizen is entrusted with the public safety, and acts an important part for its weal or woe. No government affords a wider or more promising field for the talents and exertions of the profession. Few, indeed, of its members, if they covet the distinction, may not occupy a seat in our national legislature, and it is to the profession we must look for those who guide the destinies of the republic in the councils of the cabinet.

The most delicate and the proudest feature of our jurisprudence is the right and duty of the profession and the bench to discuss and decide questions of constitutional law. It is a right and a duty almost exclusively the attribute of the American lawyer, and the American judicial tribunals. In other governments, these questions cannot be discussed or raised by the profession, or be decided by the courts; hence, whatever may be the theory of their constitutions, the legislative authority is practi-

cally, as is said of the English Parliament, "omnipotent," and there is no means of testing the validity of a law save by an appeal to arms. This will only be done when the law weighs oppressively upon all, and is felt by the whole people. With us the privilege of testing a law by the standard of the constitution, belongs to the humblest citizen. He can always raise the question whether he owes obedience to a law that transcends the limits of that organic instrument. The discussion of constitutional questions, and their decision by the bench, throws a lustre around the bar and the courts, and gives a dignity to their functions which does not belong to the profession in any other country.

Lawyers stand here as sentinels placed upon the outposts of the constitution. And no nobler destiny can be the object of their ambition or patriotism than to stand as faithful guardians of the constitution, ready to defend its legitimate powers and arrest the arm of legislative, executive or popular power raised to strike down any of its provisions in letter or spirit. This, it seems to me, is one of the loftiest missions of the bar. It is at all times, and especially now, a subject which should command the most profound and careful thought of the profession. One of our dangers lies in the facility with which, under our popular institutions, visionary legislators and artful leaders may approach and sap the foundations of the government. Other nations have a security against sudden changes in the habits of their people and the structure of their government. They have a monarchy endowed with prerogatives, a nobility graced with wealth and hereditary honors. These are obstacles in the path of progress, of even salutary changes, and ages sometimes elapse before they are accomplished.

But the vigor of our National and State constitutions, and the encouragements engendered by the unrestricted discussion of their provisions, and every feature of our government, exposes us to the opposite danger; i. e., too little regard for what is established, and a decided tendency to resort to the experimental in support of some visionary theorist. In this, our day, it is a common spectacle for newly organized political parties to seek advancement under the pressure of temporary evils by an appeal to the masses, or by plausible alarms for the public safety. And it is not difficult for popular discontent to persuade itself that what is established is wrong, and what is untried will afford permanent relief. In no government is the lawyer's sphere of usefulness greater, and his influence as a public character more extensive, than in this of ours.

The importance of a knowledge of the law can not be overesti-

mated by the members of the profession, who are called upon, in the capacity of National and State legislators, to alter, amend and repeal statutes. A single injudicious amendment may introduce the gravest doubts as to the effect upon the rights of persons and property. It is a fact well known to the profession, that great uncertainty arises from the administration of its provisions, and that they may go far beyond the legislative intent and embrace that which would have been carefully excluded had it been foreseen.

One of the results growing out of this want of knowledge of the law on the part of those who legislate, is the uncertainty it produces in statutory law. It is said a citizen stated to Lord Coke that he desired to consult him on a point of law. "If it be common law," said Lord Coke, "I should be ashamed not to give you an answer immediately, but if it be statute law, I should be equally ashamed if I answered you immediately."

The errors in the language of a deed or a will rarely extend beyond the immediate parties to the instrument, and yet innumerable questions of interpretation have arisen from such sources of private litigation to exhaust the diligence of the ablest practitioners and tax the minds of the profoundest judges. This, however, is unimportant compared with the comprehensive result of a legislative enactment which declares a new rule or abrogates an old one for an entire State or Nation, and which affects the rights and touches the interests, or controls the operations of thousands of citizens. If legislation is universal in its terms, abundant caution is necessary to prevent the mischief it seeks to remove. If, on the other hand, it is the purpose of a legislative enactment to remedy a single class of mischiefs, or amend an existing defect, or to provide a new interest, there is danger that its provisions may not reach the legislative intention, or greatly exceed it. To the lawyer, who makes the law his profession and seeks to master the science of jurisprudence for other reasons than the mere pursuit of intellectual pleasure, it offers the highest reward of human aspiration, opulence, fame, and political influence, and he who reverences its precepts will be taught to build his reputation upon the loftiest principles and the most exalted purity of life and character. It is one of the proudest boasts of our municipal jurisprudence that Christianity is a part of the common law, from which it seeks the sanctity of its rights and endeavors to regulate its doctrines. There has never been a period in which the common law did not recognize Christianity as lying at its foundation. It was for many ages administered exclusively by those who held its ecclesiastical dignities. It repudiates every act in violation of the obligations inculcated by

Christianity. It recognizes its holidays and festivals, and obeys them, as dies non juridici. Notwithstanding the sneers of the ignorant, no men are more constantly called upon in their practice to exemplify the duties of good faith, incorruptible virtue and chivalric honor, than lawyers. To them is entrusted the peace and repose, as well as the property, of whole families, and the slightest departure from professional secrecy or integrity might involve their clients in ruin. The law itself imposes upon the lawyer the severest injunctions never to do injustice and never to violate confidence. It protects him from disclosing the confidences of his client, and the lawyer who violates it is consigned to infamy in fact by the frown of the profession.

Even the lips of eloquence breathe nothing but an empty voice in the halls of justice if the ear listens with distrust or suspicion.

The lawyer in the morning of his career should acquire a just conception of the dignity and importance of his vocation. He should not debase it by a narrow estimate of its duties. He should not consider it as a mere means of subsistence, a business calling for the exercise of traffic and barter, a mere agency to disinter some buried relic of title. Let him not imagine that it is his duty as a practitioner to weave an intricate net of special pleading to deceive the wary or to hang a doubt upon the subtle distinction, or quibble through the alphabet of sophistry. The cunning pettifogger, the retailer of law suits, the sidewalk drummer for litigation can hope for no honorable standing in the profession, and no countenance from an upright bench. No man standing in the temple of justice, and in the presence of the law, should imagine that her ministers are called to unworthy offices. The profession has high aims and noble purposes.

In the ordinary course of business practice, it is true that sound learning, industry and fidelity are the leading requisites, and they yield their rewards as they do in other departments of life, but there are some, and in the lives of most lawyers, many occasions demanding qualities of higher, indeed the highest order. Upon the actual administration of law (which is but a system of rules by which justice is sought to be attained), depends the welfare of the community. One of the not unfrequently perilous duties of the bar is the protection of personal character, rights and property.

The lawyer stands as a public sentinel upon the outposts of defense, to watch the approach of danger and to sound the alarm when oppression is at hand. It is his duty to resist wrong from whatever source it may come.

The encroachment on public rights is generally by insidious

degrees. It is when the approach of tyranny or wrong are made that the highest efforts of the courage and the learning of the bar shine with splendor.

The advocate may find himself at such times imperiling the popularity of a life devoted to public service. The denunciation of the press may be used to overawe and intimidate him. But the advocate, true to his profession, stands alone for the supremacy of the law against oppression and numbers, public applause and private wealth. If he shrink from his duty he is branded as the betrayer of a trust. If he succeeds, truth and justice may triumph, and yet this may be fatal to his future hopes of political honors. His profession may require him to defend against the powerful arm of the government one charged with a real or imaginary crime, but he is not at liberty to desert even the guilty in his lowest state. He is bound to see that the law is not bent or broken to bring him to punishment. It may become his duty to vindicate innocence against avarice.

Youth may have been ensnared by the cunningly devised plans to the ruin of his property. The weakness of age may have been imposed on to procure a grant or will by which nature is outraged and avarice rewarded. In these and many like cases the efforts to unravel the fraud and expose the injury requires delicacy and courage, and may incur the displeasure of friends and the dislike of enemies. Whatever may be the wealth of fame or fortune the profession offers to those who strive for eminence in the law, he who enters it should never imagine that the road is one of royal ease or the ascent easy. No delusion is more fatal to his ultimate success. The ardent youth may dream that little more is essential than to read a few elementary books. He may indulge the belief that fluency of speech, a bright imagination, together with graceful action and steady self-confidence will carry him safely through. The general practitioner needs no other evidence that disappointment and failure awaits all who have such a total misconception of the law. He knows that among human sciences, there is none requiring such various qualifications and exclusive attainments. While it demands the first order of talents, we know that genius alone never did and never can win its highest elevation. The law is a science in which there is no substitute for close application and labor.

Chancellor Kent, who is a brilliant example of his own lofty teachings, says "That it appears to be the general order of Providence manifested in the constitution of our nature, that everything valuable in human acquisition should be the result

of toil and labor." And nowhere is this great truth more manifested than in our profession. We have all observed that moderate talents, with diligent industry, has frequently obtained the victory over superior genius and brilliant natural endowments. He who surveys without despondency or dismay, the labor in the service of the law, has achieved a great victory. It is a jealous mistress and demands a constant and long courtship. Close application and unwearied industry, together with all the moral endowments which adorn the human character, are the means by which the highest position in the profession is to be reached. If to this be added true eloquence, then we may say that he who is endowed with these, has approached as near as human genius may, to perfection.

In conclusion permit me to say, that there is not in the wide range of human affairs, a spectacle so noble as that displayed in the progress of jurisprudence, where may be contemplated the cautions and unwearied exertions of a succession of wise men, through a long course of ages, withdrawing each case as it arises, from the dangerous power of discretion and subjecting it to inflexible rules; extending the dominion of justice and reason; and gradually contracting within the narrowest possible limits, the domain of brutal force and arbitrary will.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS IN TEXAS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. CHARLES S. TODD,

OF THE TEXARKANA BAR.

Mr. President and Gentlemen of the Texas Bar Association:

The Texas statute regulating assignments for the benefit of creditors has been in force a sufficient length of time to receive repeated and thorough construction by the Supreme Court, and that construction has been favorable to the policy of the law and its general enforcement. Yet, as a matter of fact, in daily practice, this statute has been and is continually evaded with success, by means of the device of so-called "chattel mortgages," or deeds in trust in the nature of mortgages. This is due, in a great measure, to the extremely shadowy distinction between mortgages and assignments drawn by the decisions of our courts. An insolvent debtor—other than a corporation—may convey his entire assets, real and personal, to a trustee, not in fact *to secure* debts, but really to *raise a fund immediately* with which to pay certain preferred debts; and such transactions are upheld as mere mortgages to secure certain debts which the *jus disponendi* belonging to the debtor permits him to designate and prefer, to the exclusion of other creditors. These mortgages and trust deeds differ little in form, and generally not at all in effect, from assignments. It is proposed, in this paper, to discuss briefly, *1st*, the difference at common law between assignments and mortgages; *2nd*, the leading adjudications by our courts, and *3rd*,

the suggestion of appropriate legislation to reconcile conflicts, real or apparent, and clearly define the difference between these classes of conveyances, so that parties, both debtors and creditors, may know their respective rights.

"A mortgage of personal property is defined to be a conditional sale of it as a security for the payment of a debt or the performance of some other obligation. The condition is that the sale shall be void upon the performance of the condition named." (Jones on Chat. Mortg., Sec. 1.)

"A decisive test of a legal mortgage of personal property is the use of language which makes the instrument one of sale, conveying the title of the property to the debtor conditionally, so that the sale is defeated by the debtor's performance of his agreement. If there be no such transfer upon a condition express or implied, the transaction is not a chattel mortgage." (Ib., Sec. 8.)

"A technical mortgage must contain a condition of defeasance making the instrument void upon the performance of the condition, whether this be the payment of a sum of money or the performance of some other duty or obligation." (Ib., Sec. 17.)

From the very nature of the transaction the essence of a mortgage is the condition of defeasance or equity of redemption. There is reserved by, and remains in the debtor, the right to avoid the conveyance, to redeem and resume the property *within some time after* the execution of the conveyance, by paying the debt or performing the obligation of the condition. This right of defeasance or redemption is not always expressed, and need not be, but it must exist and be in contemplation of the parties at the time of the contract, which may be shown by parol when not expressed. From the very nature of a mortgage, as a security for debt by a lien on property, an opportunity for and possibility of the payment of the debt secured must be deemed a part of the contract. A conveyance, therefore, which does not either impliedly or expressly admit of such redemption or defeasance can not be a mortgage. This right of redemption, or interest in the property conveyed, remaining in the mortgagee, constitutes the decisive test and the principal distinction between a mortgage and an assignment for the benefit of creditors.

"A voluntary assignment for the benefit of creditors is a transfer, without compulsion of law, by a debtor of some or all of his property to an assignee in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor." (Burrell on Assignments, Sec. 2, p. 3.)

"Assignments are distinguished with reference to their subject

matter as being of all or part of the debtor's property. The former are known as *general assignments*, in distinction from *partial assignments*, by which term the latter are defined." (Ib., Sec. 2, p. 4.)

"The vital distinction between an assignment for the benefit of creditors and a mortgage is clearly pointed out in the case of Briggs vs. Davis (21 N. Y., 574). An assignment is more than a security for the payment of debts; it is an *absolute appropriation* of property to their payment. It does not create a lien in favor of creditors upon property which in equity is still regarded as the assignor's, but it passes both the legal and equitable titles to the property absolutely beyond the control of the assignor. There remains, therefore, no equity of redemption in the property, and the trust which results to the assignor in the unemployed balance does not indicate such an equity." (Burrell, Sec. 6, pp. 12, 13.)

This controlling distinction between an assignment for the benefit of creditors and a deed of trust in the nature of a mortgage, is well stated in the case of Hoffman vs. Mackall (5 Ohio St. Rep., 124), as follows: "The former is an *absolute* and *indefeasible* conveyance of the subject matter thereof for the purpose expressed; whereas the latter is *conditional* and *defeasible*. A deed of trust in the nature of a mortgage is a conveyance in trust *by way of security* subject to a condition of defeasance or redeemable before the sale of the property. By an absolute deed of trust (or assignment) the grantor parts absolutely with the title, which vests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of *raising a fund to pay debts*, while the former is a conveyance in trust for the purpose of *securing debts*, subject to a condition of defeasance." This principle is well settled and recognized by all the courts of this country. (*Crow vs. Beardsley, 68 Mo., 435; Fromme vs. Jones, 13 Iowa, 48; Bartlett vs. Teah, 1 McCrary, 176; Vallance vs. Ins. Co., 42 Pa. St., 441; Lawrence vs. Nuff, 41 Cal., 566; Bank vs. Chappell, 40 Mich., 447.*)

Keeping in view this plain and well settled distinction, and bearing in mind the provisions of our statute regulating assignments for the benefit of creditors (1 Sayles' Civ. Stat., Art. 65), let us briefly examine some of the adjudications of our higher courts upon this question. Many cases have been decided, and many are continually being appealed in which the instrument or conveyance is attacked on the one hand as an assignment and upheld on the other as a mortgage; and the oftener the question comes before the courts, the greater the apparent lack of uniformity in the adjudications. I shall not attempt to review all

the decisions, but will refer to some of the leading cases as illustrative of the subject under discussion.

In *La Belle Wagon Works vs. Tidball, Van Zandt & Co.* (59 Texas, 291), the instrument is not set out, nor does it appear that an *immediate appropriation* of the property or proceeds to the payment of preferred debts was provided for. The court simply held that the assignment law applied only to assignments, and did not deprive the debtor of the right to prefer creditors by any other legal contract or conveyance.

In *Stiles vs. Hill, Fontaine & Co.* (62 Texas, 429), the conveyance was made to secure *a single creditor*, and was made *directly to the creditor* without the intervention of a trustee,—and was construed as a mortgage and not within the assignment law. The equity of redemption was held to be necessarily implied from the nature of the transaction.

In *Jackson vs. Harby* (65 Texas, 710), the conveyance was directly to two preferred creditors for their benefit; in construing it to be a mortgage, the court (Robertson, J.,) remarks: "It is to be observed that the instrument vested title in the preferred creditors and not in trustees. When this is done the conveyance is held to be a mortgage and not an assignment." (p. 714.)

In *Waterman vs. Silberberg* (67 Texas, 100), the conveyance was by a debtor to a particular creditor to secure him in the payment of his own debt, and indemnify him as surety for a number of other debts. The court lays stress upon the fact that the conveyance was made by the debtor directly to the creditor, and also holds that the debtor may indemnify such creditor against liability as surety or indorser for the other debts, and the instrument is a mortgage. In the above decisions it will be observed that in every instance the conveyance was made directly to the creditor, without the intervention of a trustee, and great stress was laid upon this feature; and though no condition of defeasance was expressed, it was held to be implied.

In *Scott vs. McDaniel* (67 Texas, 315), for the first time our Supreme Court construed as a mortgage a conveyance made by the debtor to *a third person as a trustee* for the benefit of preferred creditors without regard to number. In all these cases there was to be an immediate sale and application of proceeds to the payment of debts, but no consideration seems to have been given to this fact by the court, or discussion of it by the counsel.

It will be observed that by a regular process of accretion or gradation, the construction of a mortgage has been applied to conveyances essentially absolute in their nature in that they convey the property without condition, provide for immediate possession and sale by the grantee, and immediate application of the

fund so raised to the payment of particular preferred debts. First, there is a conveyance to a single creditor; then to two creditors; then to a creditor to pay his own debt and others for which he is surety. It would scarcely be contended that the debtor ever contemplated in fact the redemption of the property, or the payment of the debts otherwise than with funds arising from sale of the property, the debtor being insolvent; nor indeed does the possibility of his doing so appear, as the grantee may at once sell the whole property, and no time whatever is provided or *legitimately implied* within which he might exercise the right of redemption. In these cases, however, the decisions are put upon the grounds of a direct conveyance to the creditor, and not to a third person in trust, and upon this ground only they are justified on principle and authority. But in the last named case (Scott v. McDaniel) the moorings are cut loose, and a plain absolute conveyance in trust to a third person of property to be immediately appropriated to payment of preferred creditors is upheld as a mortgage, and since this decision such conveyances have been often so construed, apparently regardless of the insolvency of the debtor, of the preference of creditors and of the manifest intent to make an assignment in effect—in palpable evasion of the statute. In the late case of *Laird v. Weiss*, 85 Texas, 95, it is even held substantially that to label the instrument "Chattel Mortgage" is conclusive of its character, the court saying: "The expression in the instrument, that the purpose of its execution was '*to secure*' the payment of debts, and the emphatic statement that it was '*intended as a mortgage to secure debts*,' leaves no room for argument." However, in a recent case (*Schneider v. Bagley*, 24 S. W. Rep., 1116), the Court of Civil Appeals of the Fifth District takes a different view, and one more consonant with reason. In that case the instrument states on its face that "this instrument is not intended to operate as an assignment but a chattel mortgage." Rainey, J., holding this expression to be of no force, justly observed: "Calling it a mortgage does not change the legal effect. If such could control, all a debtor would have to do when he made an assignment, would be to insert a clause in it that it was intended as a mortgage, and the law regulating assignments would be effectually evaded."

Some of the decisions lay stress on the question whether or not there is a clause providing for the return of the surplus to the debtor, or whether such surplus be of the *property* itself or the proceeds of sale thereof. (*Johnson vs. Robinson, 68 Texas, 400; Foreman vs. Burnett, 83 Texas, 402.*) This is immaterial, because in all trusts, whether mortgage or assignment, upon complete performance of the trust any surplus reverts to the

grantor. (*Fant v. Elsbury, 68 Texas, 1; Hudson v. Elevator Co., 79 Texas, 401; Padgett v. Wood, 24 S. W. Rep., 1112.*) It is also intimated that it must be the debtor's purpose to make a *general* assignment, conveying all of his property for the benefit of all of his creditors. Yet the statute does not so restrict its operation; it provides that "Every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate, other than that which is by law exempt from execution, among all his creditors in proportion to their claims, and however made or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as provided by law in conveyances of real estate or other property."

On the other hand there have been numerous decisions of recent date, recognizing the distinction herein discussed, and holding conveyances of this character to be assignments. (*Fant v. Elsbury, 68 Texas; Johnson v. Robertson, 68 Texas, 309; Hart v. Blum, 76 Texas, 113; Foreman vs. Burnett, 83 Texas, 402; Schneider v. Bagley, 24 S. W. Rep., 1116; Padgett v. Wood, 24 S. W. Rep., 1108*). The tendency of the courts seems to be to look more closely to the manifest purpose of the debtor in making these conveyances and to check the constantly increasing efforts to evade the operation of the assignment law.

Justice Gaines, in *Johnson v. Robinson*, (*68 Texas, 400*), clearly states the correct doctrine, as follows; "A mortgage being merely intended as a security for debt, gives, under our system at least, merely a lien upon the property, with or without a power of sale, leaves an equity of redemption in the mortgagor, and the surplus, if any, after the payment of the debts within the reach of his creditors by due process of law. An assignment, on the other hand, conveys to the assignee the entire estate of the assignor in the property, to be disposed of by the trustee in such manner as the assignor may have lawfully directed. The mortgagor may vacate the mortgage at any time by payment of the debt; but by an assignment, the property passes beyond the control of the assignor in any event. It is true that should a surplus remain after paying the debt, a trust would result in favor of the assignor, and the assignee would hold it for his benefit; but this is a result not contemplated by these conveyances." Again, in the same case (p. 401), commenting on the instrument under consideration, the court says: "This is an absolute transfer of the property to be sold, and the pro-

ceeds applied to the payment of the debt, and not merely a conditional transfer for the purpose of securing debts and defeasible upon condition of the payment." This is a leading case and is discussed, quoted and approved in *Hart v. Blum, 70 Texas, 113; Preston v. Carter Bros., 80 Texas, 399; Foreman v. Burnett, 83 Texas, 402*, and other cases; in all which the distinction is clearly drawn, and specially the different effect of a provision for returning the surplus of the *property*, which is characteristic of a mortgage, and the surplus of the *proceeds of its sale*, which is characteristic of an assignment.

In order to constitute an assignment it is not necessary that the instrument should recite the insolvency of the maker, nor the fact that the property conveyed constituted all the debtor's property subject to execution, nor that the debts mentioned were all he owed. If these facts *exist*, they may be shown by parol when the conveyance is silent. Neither does the failure of the trustee to give bond as required by the statute, to file the schedule of the debts required, nor even the actual intent of the debtor that the statute should not apply affect the character of the instrument, if in legal effect it is an assignment. (*Foreman v. Burnett; Preston v. Carter Bros., Fant v. Elsbury, supra.*)

Under the decisions as they now stand the subject is involved in confusion; the lines of decision being at least apparently in conflict, as in nearly all the cases the object of the conveyance and intent of the debtor was evidently the same, viz., to make provision for immediate *payment* of certain preferred debts by the direct and absolute appropriation of property to that end. Every such case is carried to the higher courts for construction, as there are no certain rules by which parties may definitely determine to what class the particular conveyance belongs. The needs of some decisive test, some well defined criterion of distinction is felt to enable parties to judge of their legal rights, as well debtors as creditors.

It is respectfully suggested that a remedy may be had, first, by the amendment of the assignment law so as to distinctly bring within its purview special or partial assignments by insolvents, so far as preference of creditors is concerned; and second, the enactment of a law clearly defining chattel mortgages and deeds in trust in the nature of mortgages; providing for a reasonable time within which the right of redemption may be exercised; and requiring that all such conveyances should receive the assent of *all* the parties thereto, *cestui que trust*, trustees and all beneficiaries, before they should become operative for any purpose, either in whole or in part; thus following out the logic of the late Chief Justice Stayton in his exhaustive opinion in the case

of *Alliance Milling Co. v. Eaton, Guinan & Co.*, (25 S. W. Rep., 614), holding that the "Assent of parties to be bound by a contract is essential to its existence." This would offer a solution of the difficulty, and prevent fraud upon creditors, as well as protect the honest debtor; it would be a "consummation devoutly to be wished" by all true right-thinking lawyers, though it might tend to destroy the occupation of the professional commercial wrecker. It would restore confidence and enlarge credit abroad, put a stop to speculative business on the part of commercial institutions at home, who too often extend credit to the unworthy upon no better security than the assurance or expectation that they will be protected, that is, "*preferred*" in case of failure, and the whole loss saddled upon the distant merchant in other States. The theory and oft-repeated argument of "protecting home creditors" is utterly fallacious and is demoralizing. It offers a premium on dishonesty, and tends to produce and encourage fraudulent failures. The good name of Texas abroad, the best commercial interests at home, and above all, the immutable principles of right and justice demand fair dealing for all alike.

The Criminal Law of Texas and its Administration.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. NORMAN G. KITTRELL,

OF THE HOUSTON BAR.

Mr. President and Gentlemen of the Texas Bar Association:

I have not chosen "The Criminal Law of Texas and Its Administration" as a theme of this paper because of any special experience in or fondness for that branch of the law, but because the previous meetings of this Association have shown that papers here presented have dealt almost exclusively with questions pertaining to common and statutory law, arising in and applicable to civil cases, hence a paper concerning criminal law may, if it has no other merit, possess and present that of variety.

There unquestionably exists in the popular mind no small degree of misapprehension concerning the principles and provisions of the Criminal Code and Code of Procedure, as also concerning the agencies employed in their administration, and the results following thereon.

Having been compelled, by the duties of official position for nearly seven years, to familiarize myself with the criminal statutes, the observation and experience in such position enabled me to judge with more or less accuracy of the results following from the operation of these agencies by which the criminal law is administered, and suggested certain desirable changes and amendments, hence I have thought I could do the profession and my "State some service" by presentation of my views in this form. The desire to logically present these views suggests:

[illegible] 25 S. W
[illegible] the consent of parties to be bound by
[illegible] to its existence." This would offer a solu
[illegible] and prevent many upon creditors, as wel
[illegible] consummation de
[illegible] in all the right-thinking lawyers, though
[illegible] the acceptance of the professional com-
[illegible] would restore confidence and enlarge credit
[illegible] business on the part of commer-
[illegible] who will often extend credit to the un-
[illegible] than the assurance or expecta-
[illegible] will be protected, that is, *preferred*" in case of
[illegible] upon the distant merchant
[illegible] The most ill-repeated argument of "pro-
[illegible] is mischievous and is demoralizing.
[illegible] and tends to produce and en-
[illegible] The good name of Texas abroad,
[illegible] and above all, the im-
[illegible] demand fair dealing for
[illegible]

THE C[illegible]

[illegible]

TEX[illegible]

[illegible]

[illegible]

Mr. P[illegible]

I have [illegible] minist[illegible] perience [illegible] the pr[illegible] pers[illegible] pertaining [illegible] ble to [illegible] it has [illegible]

There [illegible] gree of [illegible] of the [illegible] the ag[illegible] following [illegible]

Having [illegible] near[illegible] utes. [illegible] to judge [illegible] the ex[illegible] minist[illegible] ments [illegible] "Star[illegible] Th[illegible]

1. Brief reference to the principles and purposes of the Criminal Code and Code of Criminal Procedure.
2. The real and true end sought to be attained by trial.
3. Reference to the chief agencies by which the criminal law is administered, and the chief grounds of complaint as to such administration.
4. The results reached by such administration.
5. Suggestions as to amendments.

It is most manifest that the enactment of a system of criminal laws that would be found sufficient at all times to meet the needs and exigencies and the rapidly changing conditions of a great and growing State, was a difficult task, and to attain perfection at once, if ever, was impossible, and that those who were responsible for the performance of that task succeeded so well, is as surprising as it is gratifying.

While the criminal law code of Texas may not be as specific in detail and as comprehensive as the codes of some of the oldest and most populous States, where social and commercial conditions are so widely different from those existing in Texas, yet, for all practicable purposes, it is as wise, as efficient, as simple and as comprehensive a system of law as was ever devised by the wisdom of man.

That it is perfect, is not claimed; but it bears upon every page the impress of the genius and wisdom of learned lawyers, to whom the people of Texas owe a debt of gratitude, the measure of which, it is to be feared, is not fully appreciated.

The same is true of the Code of Procedure, which is a plain and safe guide to those charged with the administration of the criminal law.

The design of the code is clearly set forth in the first article, viz: "To define in plain language every offense against the laws of this State, and affix to each its proper punishment."

The object of punishment is declared to be "to suppress crime and reform the offender."

Whether or not an offense has been committed is not left to be determined by any system of foreign law, written or unwritten, but the system of Texas penal law is complete within itself, it being declared [Art. 3, P. C.] that no person shall be punished for any act or omission not made a penal offense with a penalty affixed thereto by the written law of this State, and no person shall be punished for an offense which is not made penal by the plain import of the words of a law, and the code is to be construed according to the plain import of the language in which it is written [Art. 8, P. C.]. Words, unless specially defined, are to be construed in the sense in which they are understood in common language.

The purpose and object of the code being thus set forth and made plain, article 4 declares that "ignorance of no law after it takes effect shall excuse its violation."

Chapter 2, articles 21 to 31, inclusive, out of abundance of caution clearly defines the meaning of certain terms and phrases, the meaning of which might otherwise be distorted so as to defeat the ends of the law.

The first article of the Code of Procedure declares in substance that its object is to embrace rules applicable to the prevention and prosecution of offenses, and to make such rules intelligible to the officers who are to act under them, and to all persons whose rights are to be affected by them.

The ends sought, as stated therein, are as follows:

1. To adopt measures preventing the commission of crime.
2. To exclude the offender from hope of escape.
3. To insure a trial with as little delay as shall be consistent with the ends of justice.
4. To bring to the investigation of each offense on the trial all the evidence tending to produce conviction or acquittal.
5. To insure a fair and inpartial trial, and,
6. The certain execution of the sentence of the law when declared.

There are then set forth for the convenience and information of officers those material provisions of the constitution respecting the prosecution of offenses, beginning with that most important provision of the bill of rights, that "no citizen shall be deprived of life, liberty or property, except by due course of the law of the land," and followed by other sections of that immortal declaration that finds a response in the bosom of every man who is fit to be free.

There is afterward set forth every enactment and instruction that is necessary to guide the officers of the law and counsel for defendant through the course of the trial.

In construing the code and code of procedure, the rules and principles of the common law are the rules of construction, when not in conflict with the written law of the State.

It certainly can not be truthfully asserted that a system of laws and the mode of procedure for their enforcement, so based and framed, and with such objects and purposes, can operate injuriously to the interest of any citizen, or to the body of society, save and except in instances where error, liability to which is the heritage of mortality, may occur in endeavor to administer them.

But it may be said, as is frequently done, that it is not the law, but the manner of its enforcement, of which complaint is made.

Before proceeding to examine whether or not the premises assumed by those who thus complain are sound and their conclusions correct and supported by the facts, it is proper to inquire what is meant by "the enforcement of the law," and what is the real end sought to be attained by trial?

The provisions of the Code and Code of Criminal Procedure being shown to be framed in wisdom and to be in harmony, in the main, with right and justice, the examination may properly be made in the light thereof.

The declared object of punishment is to suppress crime and reform the offender.

Punishment can only follow, if the law is to be evoked at all, after legal trial, whereby crime is, by legal methods, fixed upon the alleged offender.

Legal trial means "a fair and impartial trial," and that only can be had when there has been such time allowed in which to prepare for trial as will insure the bringing to the investigation all the evidence tending to produce not conviction only, but acquittal.

The trial thus conducted begins with the presumption in favor of the alleged criminal, that he is innocent until he is proved guilty beyond, not all possible doubt, but reasonable doubt, by legal evidence.

This provision of the law, though often satirized and ridiculed, is founded on wisdom and justice, and is sustained by the underlying principles of the philosophy of human action.

This presumption continues until it is overthrown by legal evidence and he who is presumed innocent is proved guilty, and thereby adjudicated a criminal.

The object of the law, then, is to suppress and reform him who, after a trial, on which there has been used all available evidence tending to prove guilt or establish innocence, has been adjudged a criminal.

The result, if reached at all, is arrived at by means of the rules of law constituting the code, applied to all the evidence tending to secure conviction or acquittal.

It is obvious, then, that the end sought to be arrived at, and which should be the sole purpose of the State's counsel, is to accord every person accused a fair trial upon all legal evidence, whereby the guilty may be punished and the innocent vindicated, justice executed and truth maintained.

If these premises be true, it is evident that the framers of the law, guided by the experience of the ages, knew that it would often be the case that parties would be unjustly accused of crime, hence they were careful as well to guard the rights of the inno-

cent as to insure punishment for the guilty, knowing the law has no higher or holier mission than to vindicate the innocent accused at the bar of justice.

The enlightened and learned lawyers and honored citizens of Texas, whose labors produced our system of criminal law, had not been favored with that revelation of superior wisdom that appears to be the special possession of latter day reformers, wherefrom we learn that an indictment is sufficient evidence of guilt; that grand juries, like kings, "can do no wrong;" that the law is enforced only when a verdict of "guilty" is rendered, and that the lawyer whe dares to defend a party charged with a violation of law is himself an offender against good morals and a fellow-conspirator with his client against the peace and good order of society.

Perhaps no sentiment so extreme as this is yet very widely disseminated, yet, judging by what is often heard and read, the idea does prevail to no inconsiderable extent that the law is not enforced in any case where acquittal follows trial.

To say that the law is vindicated in its might and its majesty only when pains and penalties follow upon trial, is a proposition that is without foundation in justice, reason or truth.

The purpose of the Code of Procedure is to enforce the law laid down in the code, yet if enforcement is only evidenced by conviction, why provide that all evidence shall be heard tending to secure acquittal?

This provision, wise, just and merciful of itself and within itself, proves that by "enforcement of the law" is meant not only that the guilty are convicted, but that the term alike comprises the vindication of the innocent, or those whose guilt is not established by legal evidence.

Any other construction would be without sanction in the laws of God, or in any system of laws prevailing in any civilized and Christian land.

Law is of God. His bosom is her seat. He is the God alike of justice and of mercy, of the guilty and the innocent. His law "scorched on tablet stone" is the basis of the penal law of every civilized land under heaven, and His power, majesty and omniscience was not more manifest when He handed down that law from Sinai to his chosen people than when, for the violation of the moral law, He provided pardon through His own Son, and that Son no more sublimely displayed his divine power and attributes when He denounced sin and scourged those who defiled His Father's temple, than when with divine compassion and infinite tenderness He spoke pardon and peace to the malefactor dying by His side.

The ascertained and declared purpose of the law being, then, to secure the punishment of the guilty and the acquittal of the innocent, or those whose guilt is not established by legal evidence, and the law being plain, as to what constitutes offenses, and the Code of Procedure simple and comprehensive, it is next in order to treat the means and agencies for the enforcement of the law, and some of the chief complaints made of its administration.

Both the profession and the public are familiar with the character of and designation of these agencies, and it is not necessary to consume time in any detailed treatment thereof.

Inspection of the statutes will show what scrupulous precaution has been taken to insure the selection of both grand and petit juries. Certainly three disinterested men, chosen by the presiding judge from different portions of the county, not interested in any cause on the docket, freeholders, intelligent and of good moral character, would not knowingly select improper men as either grand or petit jurors.

It may be safely stated that in nine cases out of ten the jury commissioners are men above the average of intelligence in their respective communities, and that the jurors by them chosen usually fairly represent the morals and intelligence of the county. No man is more interested in a proper enforcement of the law than the presiding judge, and duty and interest alike urge him to the selection of the best possible men as jury commissioners.

Grand jurors must be men of sound mind and good moral character, householders, or freeholders, qualified voters, and able to read and write, and must not have been convicted of, or be under indictment or accusation of theft or felony, and after being selected and reported by the commissioners, are, before being impaneled, tried and tested by the presiding judge, under oath, as to their possession of the statutory qualifications.

Certainly men so selected, citizens interested in the peace and order of the community, may be trusted to "diligently inquire into and true presentment make of all offenses," and however deficient they may sometimes prove in other qualities, no complaint can justly be made of their zeal or of their failure to present, for the value of the system is impaired by too great a tendency to present indictments on insufficient evidence, precautions to prevent which result I shall endeavor to suggest hereinafter.

The arrest of persons presented is a duty devolving on the sheriff, an officer of whom it is frequently said that he has it in his power to convict or acquit any defendant, and it has been charged that they often avail themselves of such influence. That sheriffs may use their influence and position for the public good, or abuse both to the public injury, is doubtless true, and that

such influence has been used in the past, and may be used by sheriffs in the future, improperly, is altogether probable.

Observation from a position enabling me to speak advisedly satisfies me, however, that such instances are exceedingly rare.

Sheriffs, as a rule, preserve an attitude of rigid impartiality, and where they depart therefrom, the tendency is towards the State's side. I have seen them tried under circumstances which tested their courage, manhood and self-respect, and the cases are very few indeed where they fail to come up to the full measure of their duty.

Power must necessarily be vested in some official, and if all use it as wisely, upon the whole, in behalf of law and order, as the sheriffs of the State, there would be small ground for complaint.

Their duties are often performed under circumstances in which they are exposed to hardship and danger, even to loss of life, and their fortitude and courage has been so often displayed as to have become proverbial.

The most important agency in the administration of the law, because the one whose action, when adverse to the State, is final, and that is free to do what unto it seemeth fit without danger of being called to account, save at the bar of public opinion, is the jury.

Petit jurors are selected by the same commissioners who select the grand jurors, and the qualifications of all jurors are substantially the same.

Transient and migratory individuals, having no fixed habitation, either as freeholders or as householders, and consequently not identified in interest with the community, are not eligible as jurors.

Men who are usually heads of families, property holders, either as owners or tenants, most especially in the country as owners, sober men, and for the most part reputable citizens, presumably, at least, are interested in the administration of the law and its proper enforcement.

It is at least a fair inference, judging by the motives that ordinarily control human action, that such men will not deliberately acquit guilty men, in reckless disregard of the interest of the society of which they form a part, and in the welfare and safety of which they and their families are interested.

The statement often made that the law puts a premium upon ignorance in the jury box, and that the law is such as to exclude reading, thinking and intelligent men therefrom, has no support in the Code of Procedure of Texas.

The idea which seems to be entertained by many people that

a man can not sit as a juror in a criminal case who has ever read of or discussed it, or formed any opinion in any way concerning it, is altogether erroneous.

If a party, summoned as a juror, has formed such an opinion as will probably influence his action in finding a verdict, the inquiry as to his qualifications stops at that point, because whatever that opinion may be, certainly he is not an impartial juror.

But though he may have heard of the case, and have from hearsay, rumor and newspaper reports, come to some conclusion concerning it, or may even have formed an opinion which it will take additional evidence to remove, yet if he states upon his oath that he can, notwithstanding such opinion so formed, go into the jury box and try the case impartially on the law and the evidence given on the trial, he is a qualified juror, and the defendant can not challenge him for cause. [Steagald vs. the State, 22, C. A. R.]

This rule is certainly as liberal to the State as any reasonable man can ask, and does not exclude intelligence from the jury box, but for it and honesty there makes room.

That unsatisfactory and improper results often follow upon jury trials, and that ignorance and corruption frequently find their way into the jury box is not denied, but such results are not the fault of the system, but is in a great measure caused by the fact that so many of the most intelligent, honest and best educated citizens who are eligible as jurors, evade jury service by means of grounds of legal excuse, and who, while so evading service, that every good citizen should do his share of, are readiest to condemn the finding of those who do serve, if such finding should not be in harmony with their preconceived opinions.

The cases where verdicts are the result of corruption are few in proportion to the large number of trials. Thousands of verdicts whereby humane but honest men consign their fellow-men to prison and often to death pass unnoticed, while one grossly improper verdict, whereby law is violated and justice defeated, attracts instant attention and arouses popular indignation.

Jurors who render such verdicts should be unsparingly condemned by the press and people, and be publicly rebuked in court.

That unfit persons should be sometimes drawn, or, if not drawn, be summoned as talesmen, is in a great measure unavoidable, but results, often imperfect and unsatisfactory, must reasonably be expected to follow upon the operation of human agencies, and until humanity has attained perfection and men are incapable of error, jurors will at times be found amenable to improper influences and render unjust verdicts. They frequently

render verdicts which, technically speaking, are correct, but they are fallible, finite men, sitting in judgment upon their fellow-men, and there runs through many cases some lines of light not drawn from the evidence admitted before the jury; some suggestions of human sympathy and abstract justice of which the law in terms takes no cognizance, and which are too subtle to be molded into cold statutes, but which naturally, yet perhaps unconsciously, influence the honest jury and lead to results which, while technically wrong, are abstractly just.

It is but fair to judge by the rule and not by the exceptions, and the fact that a verdict manifestly wrong so surely arouses and holds popular attention, is the best evidence that such verdicts are exceptions.

Subject, as jurors are, to the imperfections and weaknesses of humanity, and tempted as they often are to heed the suggestion of mercy and sympathy rather than the stern demands of law and justice, that they, as a rule, so bravely perform their solemn and often painful duties, is far more worthy of praise than their exceptional errors and failures are of unreasoning condemnation.

The pleas of the State are prosecuted by officers chosen by the people, and who are, in most instances, capable men. To the prompting of professional and official pride urging them to vigorous prosecution is added, as I may say in passing, should not be, the stimulus of financial reward dependent upon success; hence nothing is lacking to secure to the State capable representatives before the juries.

In many of the graver cases the official prosecutor is aided by the ablest talent that the private prosecutor can employ. So the State is rarely overmatched in the trial before the jury.

The chief servant and agent of the State in the administration of the law is the district judge. Without disparagement of the present incumbents of the district bench, or those who have filled that position during the past twenty years, it may be said they have not, taken as a whole, perhaps measured up to the standard of the district judges who held the position in earlier days, in point of legal training and scholarship, for their predecessors were, in great part, men of very great ability, called to the bar after a long study and thorough training, and versed deeply in legal principles.

Yet it is true that the incumbents of the district bench are, in the main, capable lawyers, fully as capable as Texas should expect to secure for the position, considering the standard of compensation she has fixed, which, by reason of the fact that in this comparatively new State, most of the bar are men of moderate means, practically debars the ablest lawyers from the district bench.

While they frequently err, yet called as they are to pass upon grave and difficult questions without time for investigation or due reflection, that they do not oftener err is surprising.

In the all-important regard of integrity and honesty of purpose, the judiciary of Texas have, in the discharge of the duties of their high office, always maintained and do now maintain, a lofty standard, for never during the fifty years of the existence of Texas as a State has any judge chosen by the people and receiving his commission at the hands of the intelligent and representative majority of his district, had a charge of corruption justly laid against him.

Though prompted by ambition and personal and professional pride, they accept a position, the emoluments of which barely suffice for decent maintenance, by reason whereof they leave it impoverished, yet with clean hands they lay aside unspotted the robes of office.

Given wise laws and agents for their administration who are efficient, it would seem satisfactory results should follow.

In my humble judgment, the results are as satisfactory as could reasonably be expected under all the circumstances and the existing conditions.

Yet the complaint often heard, and the criticism indulged, which, on proper occasion and within proper limits, serves a useful purpose, is not altogether without grounds of support; nevertheless such complaint is frequently unreasonable and made without due appreciation of the difficulties of the situation.

That too ready an ear is often lent to applications for continuance can not be doubted. The law declares there shall be such delay as is necessary to the ends of justice, and the errors committed in this regard arise out of the difficulty of drawing the line between undue haste and too great delay, and in distinguishing between applications made in good faith and those having in fact no merit.

Within the last decade or a little more there has been a material change of the law in this regard.

Continuances are not now a matter of right, but at all times rest in the sound discretion of the court, and it may be safely stated that many more continuances are refused than are granted.

There are, of course, many occasions when, for reasons entirely beyond the control of the court or counsel, continuances are necessary, when either the State or the defendant, without fault or procurement, are unable to produce their witnesses for various reasons that may readily arise.

In cases of homicide, a character of cases of delay in which most complaint is made, the tragedy, in most instances, occurs

in places frequented by loose and transient characters, and time is absolutely necessary to ascertain their whereabouts and serve process upon them, and manifestly in a State so large as this, witnesses can not be produced before the court as readily as in small and more thickly settled States.

But granted that every witness is at hand, immediate trial is not always desirable, nor will it be found the surest way to secure results in harmony with right and justice.

The graver the case the more certain it is to arouse the popular mind to a state of excitement and passion, and under such circumstances the people, from whom the jury must be drawn, are in no condition of mind to try and determine the case except in accordance with preconceived opinions, which would not be a fair and impartial trial.

Justice and law, then, demand that the trial be postponed until popular excitement has subsided, and men are prepared to calmly weigh the evidence and mete out justice.

If such delay is denied the defendant, and he is forced to trial before a jury drawn from the excited, maddened people, the Appellate Court will, or at lest should, and if worthy their places would, set aside and reverse the judgment.

One procedure in a criminal case which necessarily operates a continuance, and is often the occasion of severe criticism and complaint, is a change of venue. Yet there is no power vested in the trial courts more salutary and which should be more fearlessly exercised.

It sometimes occurs, and I speak on this point from experience, that counsel are unable to present an application in conformity with law, for the reason that those who could conscientiously make the necessary affidavits are so terrorized by prevailing sentiment against the prisoner that they dare not do it, lest they call down condemnation and perhaps violence upon themselves.

To put a defendant on trial in a community so arrayed and aroused against him would be judicial murder, and the plain, imperative duty of a judge, under such circumstances, is to change the venue of his own motion, and he who would not do it is a coward, unworthy to hold his high commission.

In the instance alluded to above four men had been hurried from the county jail to escape mob violence, and could not, with prudence, be returned, and to have forced them to trial in that county, under such conditions, would have been to listen to and heed popular clamor.

The venue was changed in every case upon the court's own motion, and though the delay was deplored, yet when excitement

had subsided, and a fair trial had been obtained elsewhere, the action met popular approval.

The expense incurred in administering the criminal law is also a cause of complaint and to a great extent justly so.

This can be reduced by limitations, and restrictions upon issuance of attachments for witnesses by the entire abolition of the fee system, and by establishment of exclusively criminal courts in the larger counties, or by making a criminal district of one or more large counties, thereby securing speedy trial, where it can be had with due regard to the interests of justice.

There is one agency connected with the administration of the law toward which there is more of complaint and criticism directed than any other, and that is the defendant's counsel.

He is absolutely indispensable to some of those suddenly developed statesmen who discuss every issue, from financial problems to judicial procedure.

Abuse of the lawyer constitutes at once the chief plank in their platform and the burden of their orations. Yet they have not intelligence sufficient to know that there is not a right they possess, or a liberty they enjoy, that is not assured them by laws and constitutional provisions which were conceived in the brain and defended by the blood of lawyers.

Strange to say, many people of average intelligence have to a certain extent imbibed the prejudice against membefs of the legal profession.

This is to be attributed to the fact that those self-constituted critics group all men who hold law licenses under one head as "lawyers," and judge all by the same standard.

The unworthy members of the legal profession, who have brought reproach upon it, are designated "shysters," and there are medical "shysters," editorial "shysters" and commercial "shysters," and it would be as unjust to judge all men who pursue these honorable callings by such unworthy members of the respective "guilds" as it is to judge all members of the legal profession by those who regard neither fairness, propriety nor honor in the practice.

Those representative and reputable members of the legal profession who, by reason of their character, ability and experience, are called to defend in important criminal causes, need no defense at my hands. They are members of an honorable profession and officers of the court, who discharge their respective duties with courage, fidelity and integrity.

They are rarely found on the witness stand and never in the jury box, yet let any criminal case be tried, which has to any large extent attracted popular attention, and concerning which

the public mind has reached—from rumor or report or hearsay—conclusions adverse to the defendant, and the result be an acquittal, and criticism and condemnation are heard on every side.

The judge may have sternly excluded all evidence offered by the defendant, but deemed irrelevant or improper by the court, and perhaps, as is done in many cases, may have resolved the doubt as to its admissibility against the defendant; the State may have been represented by zealous and able counsel, and the jury be composed of honest, intelligent men, who acted after carefully weighing the evidence, and applying thereto the law under the obligation of as solemn an oath as ever bound man's soul to the throne of God, yet all these facts seem to be ignored, and court, jury and counsel are all condemned.

Experience shows, however, that when the populace is stirred by passion, its primary impulse is to seek some special victim whereon to vent its fury, and in such instances as above cited, no victim is so conveniently at hand as the defendant's counsel.

The cry goes up: "Release unto us all others, but this lawyer, crucify him, crucify him!" Yet the lawyer has only opposed to the charge of guilt the legal presumption of innocence, contended for the admission of all evidence "tending to secure acquittal," and discussed the facts, all of which the law authorizes and his duty demands. He has neither written the charge, made the evidence, nor been upon the jury.

Most likely the verdict was right; every lawyer, and I doubt not many laymen, can recall cases in which the prisoner, when first arrested, was threatened with mob violence, yet, when passion had subsided, and a fair trial, with all evidence that ever existed concerning the matter presented to the jury, a verdict of acquittal was rendered, which met with popular and judicial approval.

I have seen able lawyers called from the service of clients who had paid for their services, and under order of the court assume the defense of some penniless and friendless prisoner, and use their time, their books and their brains in his behalf without hope of fee or reward, but never have I had reason to believe that one had in any case improperly approached a juror or a witness, or resorted to other than fair and legitimate methods in defense of a client.

I know not how it may be with others, but as for myself, I am wearied of this senseless and vicious clamor against that profession, the members of which have always stood for good government, law and order; who oppose mob violence; who have been in all ages, and are now, a conservative force in society, and have ever been "foremost in the files" of the defenders of liberty and constitutional government in every age.

If indeed there be grounds for complaint as to the administration of criminal law, the reason lies back and behind those who, under solemn vows, stand as ministering priests in the temple of the law.

The Court of Appeals has been charged frequently with reversing cases on purely technical grounds, whereby the ends of justice are defeated.

That judgments of reversal have been rendered by that court which were improper, no one would more readily admit than the members of the court themselves, which is evidenced by the fact that they have in most instances overruled such judgments as were most seriously and justly complained of, and they are no longer precedents, thus evincing a readiness to admit error when convinced of it, which is a sure proof of honesty of purpose.

Judgments are no longer reversed because of bad spelling in the verdict or omission of a letter, or where the penalty was improperly set forth in the charge, though the verdict was within the limits of the statutory penalty—such errors being treated as immaterial, and justly so.

It often happens, however, that what the public term technical errors are most material, and the doctrine that if "substantial justice" has been done, errors of law or of procedure should be disregarded, has no support in any constitutional system of criminal law.

Carried to its logical sequence, the act of the mob may be as commendable as the judgment of the court, for if "substantial justice" demands the death penalty, and the court ignores palpable errors of law, and the plain requirements of the statute, in order to sustain a judgment affixing such penalty, the act is unlawful, and the act of the mob, which likewise ignores the law, could not be more so, for it, too, would do "substantial justice."

Every man's guilt or innocence depends upon what the law is, and the facts of the case, and the latter can only be arrived at safely and properly by legal evidence; and if the trial court improperly states the law or admits improper evidence, an entirely innocent man may be convicted; and if the law and established rules of evidence and procedure can properly be violated by the trial court, and ignored by the Appellate Court, in order to convict one defendant on the principle of "substantial justice," then by the same method may some innocent man be convicted, and the Appellate Court, following its own precedent, would approve the judgment, ignoring the plain letter and requirements of the law.

Whenever this precedent is established, no citizen can look to the law and its constitutional agencies for protection of his person or his liberty.

Let departure be once made from these established rules of law and evidence, which are the concrete expressions of the wisdom of the ablest jurists of past ages, and chaos, doubt and uncertainty, and danger to human rights and human liberty, will inevitably follow.

The judge on the appellate bench, who ignores plain violations of the law on material questions affecting the life or liberty of the citizen, and undertakes to decide the case on the principle of "substantial justice," regards more the clamor of the populace than the obligations of his official oath.

At one time in this State, as will be readily recalled, a defendant was convicted of murder in a case that had attracted State-wide attention. The record of the trial went to the Appellate Court for review. There was found in that record palpable violation of the plain letter of that law which the Appellate Court had sworn to observe and declare.

The court declared the law as it was written, but the people had already passed upon the case, and when the able jurist, who rendered the decision, affixed his name thereto, he signed his official death warrant, and was executed at the ensuing State Convention for having done his plain duty under the obligations of his official oath.

Fortunately for the State and the administration of the law, his successor has displayed the same lofty courage and sense of duty, regardless of popular praise or blame.

The proportion of affirmances in felony cases to reversals by the Court of Criminal Appeals for the years 1891 and 1892, as shown by the report of the attorney-general, was nearly three and a half to one, or 400 affirmances to 121 reversals. Certainly this does not indicate a disposition to recklessly reverse cases for purely technical or unsubstantial reasons.

Examinations will next be made as to results reached on trials before the courts. Taking the entire State for the years 1891 and 1892 the percentage of convictions in felony cases was nearly 62 per cent. of cases tried, and in trials for a number of the higher grades of felonies the percentage was from 75 to 80. There will be found in nearly every county some case of homicide in which the defendant is so manifestly justifiable in law and morals that no conviction is expected or possible, yet as the offense is never barred by the statute of limitation an indictment and trial is sought by the defendant in order to procure the protection of a verdict. Yet despite this fact more than half the defendants tried for murder were convicted.

The percentage of convictions in felony cases above given, include the whole State, the thinly populated frontier and the older

settled portions, and if the statistics had been confined to the latter, as would manifestly be fair, if comparison with results in the older States is made, the results would show even a larger percentage, as the percentage averages in many of the most populous counties over 80 per cent.

Time and space will not be consumed by statistics in misdemeanor cases [the proportion of convictions in which, however, it may be stated was about 70 per cent.], as many of them are tried in courts presided over by judges without legal training or ability and not necessarily lawyers, hence no result is surprising in such cases.

England is often cited as the model country for certainty and dispatch in the enforcement of the law, but conditions are so different there and here that no comparison would be fair to Texas.

England has more people in one city than there is in all Texas, and has perhaps 30,000,000 of inhabitants in an area less than one-fifth as large as Texas, and a constabulary force amounting to a small army. She commands by princely salaries her ablest talent for the bench, and the judge comments on the evidence, sums up the the testimony and practically controls the verdict, which is to give defendant "trial by jury" only in name—not in fact.

Yet, notwithstanding these advantages for the enforcement of the law, the proportion of convictions in England is, in the courts of criminal assize, according to the *Counselor's Gazette*, only 75 per cent., not as large as that in very many counties in Texas.

From the figures above given, it would seem that the complaint so often made that jurors are prone to acquit is not sustained by the facts, and that in the greater number of cases the defendant is convicted.

It was obviously impracticable to review the entire code and code of criminal procedure within the limited time permitted by the press of other duties for the preparation of this paper, hence, I shall content myself with hasty suggestions as to what appears to me to be desirable amendments.

The greatest source of expense in administration of the criminal law arises from cases, indictments in which are returned on insufficient evidence.

About 40 per cent. of the felony cases for the years 1891 and 1892 [the latest statistics at hand] were nol prossed.

This could in a great measure be obviated by amending the oath of the grand jurors so as to swear them to return no indictment upon information as to what any person will swear, to have

before them witnesses upon both sides as far as practicable, and the defendant himself, if they see fit, and to return indictments in no case where they would not, as petit jurors, render a verdict of conviction, and the necessity of rigid observance of this oath should be impressed upon them by the court.

Article 394, C. C. P., in so far as it forbids the district attorney from being with the grand jury while discussing the propriety of finding a bill, should be amended. There is no reason for the prohibition; on the contrary, many indictments, on insufficient evidence, would be prevented, and great expense saved to the State if the district attorney was consulted and advised with as to the sufficiency of the evidence.

He is specially interested in having every indictment returned where conviction is probable, and is on the other hand interested in seeing that indictments are not returned where the evidence will not sustain the conviction.

The evidence before the grand jury should be taken down in writing, and be signed by the witness, even if a stenographer and typewriter be a necessary adjunct to that body.

If this were done witnesses would not, as is often done, recklessly vent their malice in the grand jury room and then decline to give the same evidence on the trial. They would hestitate to swear falsely when they knew their testimony would be preserved and perpetuated.

The statute as to perjury should be so amended and simplified that if a witness makes one statement in the grand jury room and a statement on the trial so radically different that both cannot be true, he could be convicted of perjury.

The statutes relating to assaults with intent to commit certain offenses should be amended, as results reached thereunder are at present illogical and unjust.

Assaults with intent to rape and murder, and the offense of burglary, should be divided into degrees, with penalties proportional to the gravity of the act and the circumstances under which the offense was committed, and the result.

The defendant who, for purposes of lust, assaults a woman and beats and wounds her in the struggle, or who invades a private house with such designs, even if he fails of his purpose, and the burglar who enters a private house with a deadly weapon in the night time, should both be hanged; at least such penalty for the commission of such offenses in the first degree should be within the discretion of the jury.

There is a class of cases which logically falls between assaults to murder and aggravated assault and battery, which for the sake of brevity may be classed under the general head of "whitecap-

ping." Such offenses constitute now only aggravated assault and battery. They should be defined as "felonious assaults" and be punished by imprisonment in the penitentiary.

The statute as to swindling should be simplified and amended to meet existing commercial conditions.

The law concerning perjury should be so changed as to make simpler indictments for that offense, one most common, yet most difficult to frame indictment for or to convict upon trial as the law now is.

The minimum penalty for horse theft is the same as that for murder in the second degree, and the maximum is higher than that for burglary or any species of theft. The penalty should be reduced to correspond with that for other similar offenses.

The term "money" is defined as to certain offenses, but not as to the offense of "misappropriation of public funds," and where such "misappropration" is charged as having been "money," unless the State can prove legal tender, or gold and silver, conviction can not be had. The necessity of amendment is obvious. [Lewis vs. State, 28, C. A. R.]

Frequently magistrates admit persons to bail where facts do not warrant such action. I recall no process whereby such action can be set aside, provided the bail furnished be sufficient. This power is capable of great abuse, and the statute should authorize the State's counsel to present the action to the district judge for review, and he be authorized to reverse the order and refuse bail if the law and facts demand such action.

The court should be allowed to appeal from judgments quashing indictments, at least to the extent of having the sufficiency of the indictment determined for future guidance.

An incompetent or corrupt judicial officer, at a time when another indictment would be barred, can, by quashing an indictment, set entirely free a defendant charged with any offense except murder, and the State has no remedy.

The statute should provide that indictment should operate to arrest the running of the statute.

Article 749, C. C. P., should be amended so that inquiry can be made as to the circumstances under which a confession is made, so that it should not necessarily be excluded because the defendant was under arrest and was not warned.

It is possible under the Code of Procedure concerning the time after sentence before the death penalty shall be executed for a judge to indefinitely postpone the execution of the sentence, as no maximum time is named, but he shall not fix the date *earlier* than *thirty* days.

The method of impaneling a jury in a capital case should be changed.

The number of challenges should be reduced, say to respectively twelve and six, and thirty men should be fully tested and qualified as to the particular case and their names placed on a list from which each side, should strike, as in felonies less than capital.

This would be fair alike to the State and defendant, and greatly expedite and simplify the process of selecting a jury.

There may be other changes and amendments which could be wisely suggested, but I am admonished to hasten to a conclusion.

However efficient the agencies for the administration of the law may be or however plain be the law itself, behind the law, the courts and juries and the lawyers are the controlling influences of the people and public sentiment.

Regard for the law, for the rights of others and for human life depend upon the moral training which is given at home, at the fireside and the family circle.

The verdict of juries will usually reflect the standard of morals and regard for law prevailing in the community. Judged by results in Texas, and taking the number of convictions as the test of efficiency of the courts, there is no reasonable ground of complaint.

If asked what, in my judgment, would be most conducive to render the courts still more efficient and at the same time guard the rights of the citizens and the State, I would say abolish the fee system entirely, let no officer be dependent in any way upon the result of any case.

Give every defendant the privilege of being tried before courts of which the judge is a capable lawyer, whether such defendant be charged with a felony or misdemeanor, or whether he be defendant in a civil or criminal case, wholly abolishing the present system of county courts. Pay district judges at least twice their present salary, or more if necessary, to command the highest order of talent; elect them for ten years, subject to removal by the Supreme Court for incompetency or corruption, and let them be eligible but for one term, so that their interest as candidates and their duties as judges may never conflict. Dissever as far as possible the civil and criminal jurisdiction of the courts, as under the prevailing system of practice a judge fully qualified in both lines of the law is not often found.

Courts thus organized will be found efficient, and while delay in legal proceedings can never be wholly obviated, yet greater dispatch and accuracy will be attained and justice be done at less expense to the people than under prevailing conditions.

JURIES AND JURY TRIALS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

JUDGE T. H. CONNER,

OF THE EASTLAND BAR.

Mr. President and Gentlemen of the Texas Bar Association:

By reason of circumstances that were imperative, but of no interest to this body, I was prevented from any effort to comply with my promise to submit a paper until within a very few days before this meeting, and even then interruptions occurred so that it was with the greatest hesitation that I concluded to submit any paper at all, knowing full well that the time at my command would not enable me to do more than, in a brief way, submit general thoughts, but my appreciation of the honor done me by your committee, and my knowledge of the charity and forbearance of my professional brethren is such, that to the best of my ability and the time and means at my command, I will endeavor to contribute my mite to the interest of this meeting of the Association.

I see in the published programme it is stated that a paper from me on "Juries and Jury Trials" may be expected. I can assure you most sincerely that until I so saw the publication I had no thought of writing on such a subject. I presume my friend, Mr. Clark, of the committee, becoming impatient at my report of "no subject yet selected," thought that if there was anything that a district judge in Texas would ordinarily know something about, it would be juries and jury trials, and therefore, from pure kindness of heart, so assigned me in the programme.

The right of a trial by jury is certainly a venerable institution.

Its origin is said to be lost in the obscurity of the middle ages. It has been said that Tacitus gives an account of the struggle of the people in the forests of Germany for the right of trial by jury over two thousand years ago. That it was carried into England by the Saxons, and by them finally established in substantially its present form. However this may be, it is certain that at an early period in English history the right of a trial by jury was established, maintained and perpetuated. The principle was brought with them by English colonists, who settled America, and we find, among other grievances impelling our forefathers to the declaration of independence, as therein recited, was one "for depriving us in many cases of trial by jury." After the immortal struggle that resulted in the birth of the new nation, we find our people in the first constitutional declaration promulgated, among other things, declaring that "the trial of all crimes, except in cases of impeachment, shall be by jury."

Articles 6 and 7, of the amendments to the Constitution of the United States, soon thereafter made, provided that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein committed. And that in suits at common law, where the value of the amount in controversy exceeds $20, the right of trial by jury shall be preserved." I have had no opportunity to examine, but I doubt not that similar provisions are contained in the constitutional declaration of the people in every State of the American Union. In our own State we find that as a republic our people, in the midst of the heroic struggle that won for Texas her domain and liberties, in convention assembled on the 17th day of March, 1836, adopted a constitution in which, among other things, it was declared "that in all prosecutions by presentment or indictment, he [the accused] shall have the right to a speedy and public trial by an impartial jury." In the constitution of Texas as a State, in 1845, it was declared that "the right of trial by jury shall remain inviolate." Substantially the same provisions are found in the constitution of 1861 of the Confederate States of America, in the constitutions of the State of Texas of 1866, of 1869, and of the present constitution, that of 1876. It would be interesting, if my opportunities enabled me to do so, to quote a number of the many truly eloquent panegyrics on the value of the right of jury trial. I will quote but one, however, that of one of our own judges, given in among the earliest days in the history of Texas people. He says:

"The institution of jury trial has perhaps seldom or never been

fully appreciated. It has been often eulogized in sounding phrase, and often decried and derided. An occasional corrupt or biased or silly verdict is not enough for condemnation; and when it is said the institution interposes chances of justice and checks against venality and oppression, the measure of just praise is not filled. Its immeasurable benefits, like the perennial springs of the earth, flow from the fact that considerable portions of the communities, at stated periods, are called into the courts to sit as judges of contested facts, and under the ministry of the courts to apply the laws. There the constitution and the principles of the civil code are discussed, explained and enforced, and the jurors return into the bosom of society instructed and enlightened, and disseminate the knowledge acquired, and do we not perceive, without further illustration, that to these nurseries of jurisprudence and of the rights of man, more than to all other causes, the Anglo-Saxon race has been pre-eminent for free institutions, and all the political, civil and social virtues that elevate mankind?"

I quote from the opinion in the case of Bailey vs. Haddy, admr., etc., decided at the January term, 1841, and published in Dallam, p. 376, et seq. To this might be added many others, but enough has been said to establish the fact that the right of trial by jury is deeply imbedded in the mind and heart of the American people. That from the very inception of our nation the American people have regarded it, and by constitutional provision declared it to be, a right inherent in the people above and beyond any power of deprivation in any law-making body or in any executive. Had my time and opportunity of investigation so enabled me, it might have been instructive at this point to have compared results in the nations of the earth granting to its subjects the right of trial by jury, and those nations in which controverted facts, of both civil and criminal nature, are determined by some other method. I have no doubt that comparative results would be entirely satisfactory to the most ardent advocates of jury trials. Lawyers, as a class, are not iconoclasts. On the contrary, as a rule, they cling with the greatest tenacity to approved principles, forms and precedents, and when we consider this tendency, the traditions and spirit of our race, the never ceasing disposition of our people to retain this right as manifested throughout every struggle, every revolution and every change in government, and in the care with which, by constitutional declaration, they have declared that the right of trial by jury should remain inviolate, it would seem indeed to be a herculean task to abrogate this time honored institution. I surely shall not attempt it. I have no disposition whatever to attempt

it. On the contrary, I feel that with the spirit of my race I should combat with all my powers any attempt to impair the real principles involved in the right.

But is it true that the method of trial by jury as now employed is beyond improvement; that the wisdom of the age is insufficient to devise a method by which we, as a people, may retain every substantial, beneficial result of trial by jury, and at the same time divest ourselves of some of the imperfections of the present system? If it can be done, it is certainly worthy of the effort of a patriotic, liberty-loving people. The result would certainly repay the most patient thought and labor. That the present system, in some instances, is imperfect, or at least in some instances leads to unsatisfactory results, none will deny. It seems that in the time of the eulogy heretofore mentioned, to use the language of the judge quoted, "The institution of jury trial had perhaps seldom or never been fully appreciated. It had been . . . often decried and derided." And from that day to this I doubt not thoughtful persons, both within and without the ranks of our profession, have had frequent occasion to lament that it was not more perfect. At the present, some of our ablest lawyers are openly, in the public press of the day, advocating a change in the system by jury trial, no conceivable motive for such advocacy being apparent save an earnest desire to benefit our people and time. It is hardly necessary, I feel sure, to multiply illustrations of objectionable features in jury trials; there is scarcely a lawyer or judge present, or any other person observant of jury trials in our courts, to whom will not occur instances in which "imperfection in the system" was suggested. I will cite a few only, falling under my own observation, that will serve as illustrations of whole classes of cases:

The first I will cite was a murder trial, in which there were a great number of witnesses and great expense involved. The evidence appeared conclusive, but was nevertheless exhaustively argued. The trial consumed something like a week, and after the jury had been kept together three or four days, I was compelled to discharge them, because of the fact that one of the jurors refused to agree to any verdict. The eleven jurors agreed upon a verdict within a few minutes after their retirement, but the one was deaf to all persuasion and argument, and refused to even assign a reason why he could not agree; at least the eleven so reported after the discharge. I never did find out what was the matter with this juror, but I adopted the most charitable view, that he was influenced by the power and magnetism of an able counsel in the case, to whon the juror was much attached.

Another was also a murder trial, at the result of which there

was much well founded public dissatisfaction. It was brought about, as almost universally conceded, by one juror. It appears that on some former occasion, in another county, this juror had himself been on trial for murder, and the defendant was "for him" on that trial.

Another case was a long, tedious trial for theft. The evidence left no apparent doubt, but one juror remained stubborn to the last. He would neither say defendant was or was not guilty. He said he had "forgotten the evidence; did not believe the lawyers, and was waiting for God to tell him which was right." I assure the Association that this is mentioned in no spirit of irreverence, but as one of a type. I had every confidence in the purity and honesty of the juror. He was known as a good citizen. I might add, however, parenthetically, that the court's patience and the business of the term would not await the expected supernatural information.

Another case was that of a non-resident land owner, who sued the occupant of his land. The occupant claimed under tax deed to him. After the evidence was in, I remember the court to have picked up his pen with intent to instruct the jury to find for the plaintiff, but it happened that the defendant was represented by a young counsel who had just located, and who was, the court knew, anxious for the opportunity of an introduction, and the court, for the time, having but little else to do, concluded to instruct the jury and give my young friend an opportunity for an opening speech—the introduction desired. The essentials of a valid tax title were duly given in the charge to the jury. In several essential particulars there was a total failure in the tax title proven, but the eloquent appeal of my young friend prevailed, much to the astonishment of the court.

Additional force would be given if I could appropriately tell you of the final results in some of the illustrations I have given, but final results I can not give without personating, and this I desire to avoid, my object being to make a few simple illustrations only of types of cases, and objectionable features that rarely, if ever, appear in print, but that are frequent in actual practice.

From our reports we might multiply instances where long, tedious and expensive trials have been worse than idle consumption of time, labor and money, because of the reported fact that "the verdict was excessive," or the "jury influenced in some way by 'passion or prejudice,'" or the jury "separated," or one or more of the jurors were guilty of some "misconduct," etc., and I have no doubt but that, to the mind of those present, will occur other and more forceful illustrations of some objectionable features of our jury trials that it is certainly desirable to correct, if

it can be done. In considering this matter it will be interesting to note the plan suggested and advocated by one of our own eminent lawyers and judges. I refer to Judge A. T. Watts, of Dallas, who suggests the selection of three judges, to whom shall be submitted all questions of law and fact, and a majority of whom may determine the issue in the trial of causes. Lawyers, in their conservatism and well-known hesitation to depart from the old and try any new system, are apt, especially of first view, to combat this idea. That was, and is, my own disposition, but, as my experience increases, my opposition to the idea has to some extent decreased. One of the great reasons, if not the reason, why our ancestors insisted upon the right of trial by jury was that their rights should not be dependent alone upon a judiciary whose maintenance and tenure of office was dependent upon the will of the sovereign only. It is easy to see how with a hereditary king or ruler, and with courts and judges subject to his will only, oppression and other evils might arise. But with us the people are sovereign. The power of the legislative, executive and judicial departments of government are limited and defined by constitutional enactment, and the judges selected at short intervals by the people themselves. As a rule, they come out from among the people, and return again into the body of the people, and in passing, I can say, and I say it with pride, that I do not believe there is to-day upon the earth a purer, an abler or more fearless judiciary than that of our own proud State. In an experience of many years I hardly recall a single case of corruption, and their utter fearlessness of the clamor of the multitude or the behests of the executive when opposed to their sense of duty, has been demonstrated time and again, and I doubt not, will be as long as Anglo-Saxon blood and the Christian religion run hand in hand. I feel that I would be willing to trust in their keeping my most sacred rights. In considering the plan suggested, it will be observed that there is nothing in the original idea of a jury trial requiring that there should be twelve. We ourselves have twelve in the district court alone, a less number in other courts. In the great charter given by King John to his barons at Runimede in 1215, it was provided merely that he, King John, or his chief judiciary, should send two judiciaries through every county four times a year, who, with four knights, chosen out of every shire by the people, should hold assizes on the day and at the place appointed. The mode of selecting the four knights by the people is not suggested. And, it may be observed, that while the right of trial by jury is retained, yet the number of the jurors, their particular qualifications, and the mode of their selection is not given in either the constitution of

the United States, nor of any constitution of our own State hereinbefore mentioned. I am aware of the fact that by the common law a jury was composed of twelve men, and that by legislative enactment the common law, when not inconsistent with our constitution and laws is made, together with such constitution and laws, the rule of decision until altered or repealed. I am also aware that it has been held by reputable courts that the term "jury" in a constitution imports, ex vi termini, twelve men. I have not had the time nor opportunity to examine how fully such holding is supported by reason and other authority, but conceding that the term "jury" in the constitution of the United States and in our own State imports twelve men, and that by legislative enactment we are bound by the common law rule on the subject, yet these are but obstacles that may be lawfully removed should it generally be deemed wise to adopt the rule suggested. Webster and Bouvier both define a jury to be "A body of men who are sworn to declare the facts of a case as they are delivered from the evidence placed before them." The number, qualifications or method of selection not being stated. An examination of the legislative enactments of this State, and of the other States, will develop the fact that the mode of selection and qualification of jurors is not and has not been uniform. Under our present jury law, and I regard it the best we have ever had, the juries are selected by three jury commissioners appointed by the court. The petit jurors so selected serve one week, and to be qualified are required, among other things, to be men of good moral character, and able to read and write. Wherein would lie the evil result, if the people after discussion and time for deliberation, themselves directly selected their petit jury, required them to serve one year or two years, or any period other than a week, that should be deemed wise, and of requiring that the so selected should not only be men of sound mind and good moral character, but should also be learned in the law, and especially skilled in the very business they are required to perform? I will not now and here say that such a plan would be best. I have not heard all that may be said for and against it, and there may be some fatal objections that in my hurried view of this subject have not occurred to me, but I can say that I have very often heard this plan commended by the men who now undergo the labor of jury service. It may also be said that, as a mere matter of economy, it would be much cheaper. There are six counties in the district over which I have the honor to preside as judge. I have made a careful estimate, and feel entirely safe in saying that the annual expenses actually paid by the counties for service of petit jurors alone in this district is equal to $7,500. In fact I think

the amount would exceed this, but this amount is sufficient to pay the salaries of three judges at the present rate of compensation, and have you ever considered the value of time lost in coming to and returning from court by petit jurors? They are often required to spend a day coming to and a day in returning from court, for which they receive no pay. Large bodies of them are constantly required to appear before the court in special venires, and for which they receive no compensation. I doubt if lawyers as a class realize the patience and patriotism of our petit jurors in their uncomplaining burden of jury service. If they could hear the oft repeated statements to the judge, begging to be excused because his crop or other business is to suffer on account of his absence, etc., there would be a very lively appreciation of that part of the burden that is not measured by dollars and cents. I yield to no man in my admiration and esteem of the men who form the body of our juries. I have an exalted confidence in their purity, rectitude and sound common sense as a whole, but in every department of life it has been found that to secure the most perfect results there should be careful training for the particular labor to be performed, and as a rule the more perfect the training the more satisfactory result. Why will this rule not apply to one whose duty it is to scrutinize the manner, intelligence and bias of witnesses, to determine the weight to be given to facts proven and pass upon and determine the rights of men and mete out exact and even handed justice? I confess that a valid reason why this would not be true does not occur to me.

I think it may also be conceded that if all cases were tried before three judges of the proper qualifications, that much time and expense would be saved in the time taken to impanel juries, to prepare bills of exception, motions for continuance in the arguments of counsel upon the introduction of testimony and upon the merits of the case. I feel safe in saying that within the ordinary experience of the trial judge, he finds that he can try two non-jury cases in the time required to try one jury case. And it occurs to me that there would be many less appeals, and reversals when appealed, if the trial judge had the advantage of the advice, counsel and aid of two learned and trained associates. There would certainly be no "hung juries," no reversals or new trials because of separation and other things which the utmost care of the judge is unable to provide. Many other reasons in support of this rule of trial could perhaps be urged, and without remembering what they are, I have no doubt have been urged by Judge Watts in the advocacy of the rule suggested by him. The fact that the rule suggested is new does not necessarily constitute an

objection. In our State we have widely departed from the common law rule of pleading. Our courts administer relief without reference to the distinction between law and equity maintained by the common law, and I have no idea that it is the will of our people to resume the common law rule in these particulars; on the contrary, I think with great uniformity the profession in this State take pride in our rule on these subjects. But I desist—I do not desire to present an argument in favor of the rule of trial by three judges, but rather to be suggestive only, for I do not feel that my opportunities and deliberation on the subject would as yet justify me in a committal to this plan. If, however, it be conceded that this plan is too radical a change from a usage dignified by age, and so deeply implanted in the love of our race, then might we not with safety so change the law and our constitution, if necessary, as that a verdict of a petit jury might, with the approval of the trial judge, be received when concurred in by not less than nine of its members? Our present constitution now provides that nine members of a grand jury shall be a quorum to transact business and present bills.

And that in trials of civil cases and in trial of criminal cases, below the grade of felony, in the district courts, nine members of the jury concurring, may render a verdict. * * * It is further provided, however, "that the legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict; and it appears that the first legislature after the approval of our present constitution was unwilling to afford even the relief promised by the constitution, for it is provided that 'where pending the trial of any case in the district court, one or more of the jurors, not exceeding three, may die or be disabled from sitting, the remainder of the jury shall have the power to render the verdict.'" * * * But in all other cases it is provided that no verdict shall be rendered in any cause except upon the concurrence of all the members of the jury trying the same. And in the revision of the laws of 1879 it is expressly provided that in a felony case less than the whole number can not render a verdict. If it be conceded that nine members of a grand jury may properly present the essential foundation of the gravest crimes, and thereby institute stupendous and expensive trials, no good reason is perceived why a final determination of the matter might not also be made by less than the whole number. I do not assert that there may not be a good reason, but I do assert that I have not heard it assigned. In most deliberative bodies in our system of government provided, and usual in the determination of the vital questions affecting our rights or liberties, a simple majority is sufficient, or at most a two-thirds ma-

jority. Such majority of the representatives of the people, duly chosen, in the absence of armed revolution to the contrary, may either provide or abrogate the right of trial by jury, suspend the habeas corpus act, extend the powers of legislative, judicial and executive officers, and make and unmake laws of immeasurable importance to the welfare and prosperity of our people. If this may be done, then why not nine members of a petit jury determine the issuable facts in all cases? By so doing we would be enabled to avoid, in most instances, a very objectionable feature of our present system—the "hung jury." The one juror who "can not remember the evidence and who does not believe the lawyers." As before stated, I have every confidence in the intelligence and integrity of our jurors as a whole, yet an experience of over ten years as a practitioner, and of over seven years as a trial judge, has but intensified in my mind the difficulty, in hotly-contested cases, of excluding the one juror who gives our trial courts such trouble. The way suggested may not be the proper way, but if there is a way in which, without sacrifice of important principles, so many of our mistrials can be avoided, then it is clearly to the interest of our people that our law-makers provide such way.

The subject is by no means exhausted, but, Mr. President and gentlemen of the Association, I find that my paper has been extended to a length not contemplated, and I will no longer detain you. The crude ideas thus hurriedly prepared are committed, if indeed they be deemed worthy, to your more mature judgment for further consideration. My object is not to destroy nor to impair the sacred right of a trial by jury, but on the contrary, to preserve it, to maintain it, and, if possible, transmit it in a more perfect form to our posterity; and while this is, perhaps, more appropriately the work of our legislators and statesmen, yet judicial reforms and changes, as a rule, excite the deepest interest in the ranks of our noble profession, and hence it may be that I have contributed, temporarily at least, to the interest of this occasion. If I have been so fortunate as to have done so, I am thankful.

The Respect Due by Members of the Bar to the Judiciary.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. T. F. HARWOOD,

OF THE GONZALES BAR.

Mr. President and Gentlemen of the Texas Bar Association:

It was agreed by the framers of our federal constitution that the system of government proposed by them would be a failure without an able and independent judiciary.

The executive, armed with the sword of the nation, the humane depositary of pardons and reprieves, intrusted with appointments to office and stations of honor which confer wealth and reputation, and perhaps added to these a personality which makes him for the time being the idol of the people, must be held in check.

The legislature, having the sole power of enacting and repealing laws, of levying taxes and disbursing money, composed of representatives fresh from the exciting contests of the people, always aggressive and frequently overbearing, they regarded as the most powerful and dangerous of the departments of government and sought to restrict and control it. This they determined to accomplish through fundamental laws defining and limiting the powers of each branch of government enacted into a constitution by the people themselves.

This fundamental law is the subject of universal admiration by all students of our form of government. Mr. Bryce, in his admirable work, "The American Commonwealth," thus aptly describes it: "It is the conscience of the people, who have re-

solved to restrain themselves from hasty or unjust action by placing their representatives under the restrictions of a permanent law. It is the guaranty of the minority who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreters and enforcer thereof set high above the assaults of faction." It is the deliberate judgment of the people on fundamental questions of right and wrong, expressed at their best moments. The function of construing the fundamental law, and preventing its infraction, was assigned, among other duties, to the judiciary. This august body was devised as the balance wheel of our rather complicated machine of government.

While invested with the sovereignty of the State or Nation, it is conceded to be the least dangerous and most beneficent of the departments of government, for the reason that it can only construe and enforce law as enacted, and then only on particular cases where its powers are voluntarily invoked. It is manifest from the debates of the convention by which our federal judiciary was presented, and the able papers in the *Federalist* urging its adoption, that the best method of securing an independent judiciary was one of the questions most maturely considered by that body. The plan finally selected was: First, by making their term of office "during good behavior"; that is, removable only by impeachment. Second, by securing their appointment by the president, with the advice and consent of the senate. Third, by providing that their compensation shall not be diminished during their term of office.

Thus is secured "permanency in office, responsibility directly to the sovereignty of the people, and an assured and fixed income." The considerations which prompted these safeguards are so forcibly presented by Mr. Hamilton, that subsequent writers usually content themselves by simply referring to them. The method, in a great measure, is the same which has secured for Great Britain those judges who have enriched the law by their learning and by their character added dignity, honor and respect for the judiciary among all English-speaking nations. It is admired and approved by De Tocqueville, Bryce, Von Holst, and other continental statesmen and jurists, besides Story, Cooley, David Dudley Field, Minor, and others of the best jurists and commentators of our own country. It has enabled the national government to acquire and maintain a Supreme Court which is the admiration of the world. Remarkable in that it is the only one having jurisdiction to determine controversies between sovereign States, and enforce obedience to its decrees; States more wealthy and populous than many of the kingdoms of Europe. And valuable as has been the

subject matter of litigation determined by this court, and important as have been the results of its decisions to millions of the citizens of this Republic, no one has ever successfully called in question the personal integrity of any one of its members.

While such has been the general result, it is not claimed that errors have not been committed; that the federal courts have not, at times, been influenced by political bias, selfish and sectional motives, perhaps, and other frailties of human nature. And careful as is the constitution, to place their appointment above and beyond considerations of party fealty and party expediency, we have too fresh an example of the pregnability even of this feature to the assaults of party malevolence and rapacity in the defeat of Peckham and Hornblower by the United States Senate, to claim for it perfection.

Texas, wisely or unwisely, is committed, by its constitution, to the election of all its judicial officers for short terms by direct vote of the people. It is useless now to urge objection to the plan. Duty requires that we make the best use of the system established by our supreme law. The judiciary of this State has the same functions, the same responsibility, and is just as necessary for the preservation of our State government as the federal courts are for the preservation of the federal government.

It is then a matter of supreme importance to the bar of Texas, as well as the citizens of this State, that our judiciary be composed of men learned in the law, deeply imbued with the vital principles of our form of government, and fearless in the discharge of their duties. That they be removed, as far as the system will permit, from unworthy and distracting influences. Their independence, learning and character give weight, importance and respect to their decisions, and indirectly shed lustre on the bar and State from which they are chosen. This is an importance not confined to the particular parties litigant; but in so far as the opinion of the court is sound, the conclusions just, the reasoning cogent and the subject matter of litigation general, it carries weight and is cited with approval in the other States of the American Union, and even in England and its dependencies.

Should an arrogant and ambitious executive exceed the constitutional limitations of his power, should he entrench on the functions of the legislative or judicial departments, as prescribed by the constitution, should he disregard the liberties of the citizen reserved in our bill of rights, the judiciary would, on proper petition from any person aggrieved thereby, declare such acts void and enforce its decree.

Should the legislature enact laws prohibited by the constitution or bill of rights, the injured persons can appeal to the courts

and have such laws declared void. These duties and powers preserve our government in its integrity, but are more potential than active. They are seldom called into exercise, but, like the army and militia, give security, repose and confidence to the citizen. But, aside from these governmental questions which go to the preservation of our form of government, there are others more common and not less important. I refer to those duties common to the judiciary of all enlightened States and nations, that of presiding at the trial of causes in the first instance or on appeal as to private rights and public wrongs. Those tribunals which interpose the barrier between civilization and barbarism, the conservator of the peace, the refuge of the weak, the protectors of the rightful owners in the enjoyment and use of their property, the guardians of the family and enemy of criminals. In the fearless and upright discharge of these duties is the judiciary most severely tried and most often tempted. They are confronted with the most intricate questions of conflicting law, of complicated facts, involving the estates of minors, of the insane, of aliens, as well as those affecting the interests of influential citizens, of corporations, municipalities and counties. Questions where great hardships and outraged justice appeal strongly to the sympathy of the judge on the one hand and a principle of law crystallized into a rule of property, which, for the protection of the public, must be adhered to, on the other. These and countless other grave problems must be met and disposed of by the judiciary daily. In each case one or the other side of the controversy is disappointed.

The home of a family has, perhaps, been lost, domestic happiness has been destroyed by the decree of the court; mayhap the avarice of a greedy litigant has been thwarted; another unfortunate, through his own ignorance, carelessness or misplaced confidence, loses the accumulations of a lifetime; it may be a criminal is punished in a manner that casts disgrace and humiliation upon his relatives. One cries: "Oh, noble and upright judge!" "A Daniel has come to judgment!" The other doubts the integrity of the court, rails at the law and his attorneys, and proclaims that justice is a "vain delusion and a snare." Thus it is that when a member of the bar disencumbers himself of his causes, delivers up his briefs and accepts a judicial office, he is in duty bound to disregard his prejudices, his enmities and his friendships.

And it is not always that the temptations to be most strongly resisted by the judiciary, especially when they are selected for short terms of office by vote of the people, comes from the influence and enticements of the strong and rich. Upon the contrary,

popular prejudice against corporations and non-residents, undue complaisance to the demands of friends and neighbors for damages, frequently influence juries to verdicts unconscionable and demoralizing, and both firmness and independence are required in the judiciary to cause justice to be done. The judiciary, while thus selected to exercise some of the highest attributes of deity, are but mortal, and subject to the frailties of human nature. But to their credit be it said that heretofore the nature of their duties, the responsibilities of office and, above all, the traditions of the bench and bar, inherited, as it were, from a long line of distinguished predecessors, have kept the bench pure and upright to a remarkable degree.

In Texas our appellate courts, save for a short period when occupied by aliens to our people, have stood above reproach, and the record of the trial judges presents but few instances of misfeasance or malfeasance in office. They have secured and maintained, as a rule, the confidence of the people, and their judgments have been acquiesced in with but little question or irritation by the body of the people. In times of peril and political upheaval, when demagogues run riot and agitators are abroad in the land; when the populace in their madness forget justice, disregard the rights of property and the obligation of contracts, then it is that the conservative citizen and the patriot turns his eye to the judiciary, the very palladium of his safety. It is verily a tower of strength not easily undermined by threats, or fraud, or corruption. Its slow and deliberate processes, its power to bring out the facts and throw light on injustice and conspiracy by compulsory process for witnesses, give time for the consciences of the people to become aroused and their better natures to assert themselves, and finally right prevails.

These functions and responsibilities of the judiciary have been recalled with a view of impressing the importance of the judicial office. No one should be more sensible of these facts, no class more responsible for the character and ability of the bench, than members of the bar; no aggregation of citizens have it in their power to build up and destroy public confidence in the judiciary like lawyers.

The judiciary, save in the most inferior courts, come from the bar; come with all the traditions and class bias of their brotherhood. Presumably, they represent its best product, and by their success or failure add prestige or cast discredit on the profession of law. Recognizing, then, the correlative and indissoluble connection of the two orders, what should be the attitude of the members of the bar to the judiciary? The statement of facts suggests the response: "Unfailing courtesy in its presence, unre-

served respect for its rulings." This is not always easy. In the ardor of trial, the irritation of unforeseen disaster, surprised by a ruling that seems to the practitioner contrary to precedent and subversive of justice, it is frequently difficult to accept the decision with unruffled demeanor. But the duty is none the less imperative, and its exercise none the less indicative of the high character of the practitioner. He should remember the vantage ground, the view point of the judge, forgetful of parties, weighing the facts and applying the law, his vision undimmed by zeal for his client or ambition for professional victory, and submit without murmur to his ruling. But whether the judge be right or wrong, the duty is the same. The attorney owes respect to the office, if not to the fallible judgment of the man. This respect does not consist merely in outward demeanor, that polish of manner which is universally accorded in polite society by one gentleman to another, or in the mere civility which it is the duty of the court to enforce. It should comprehend a deeper and more patriotic altitude of mind, a respect for the law, and all the instruments of the law, its administration and its administrators.

This respect, properly interpreted, carries with it the obligation of absolute honesty in all positions taken before the court, and unreserved truthfulness and fairness in all statements made to the court. Those who have a different conception of the office of the lawyer, who deem it smart to trick the court by taking positions known by them to be contrary to authority, or by making garbled or partial statements of the facts, not only destroy their own influence, but are guilty of moral wrong, throw discredit on the practice, and create dissatisfaction with the administration of the law.

But a proper respect for the judiciary does not stop short of all functions of the lawyer in the presence of the court. He is not absolved when he finishes addressing the court. It carries with it courtesy and consideration toward opposing counsel, an observance of decency and civility in the examination of witnesses, and decorum and moderation in his address to the jury; such conduct, in fine, as a sworn officer should observe in one of the gravest institutions of a free country. These observations may seem unimportant, but nothing has done more to bring reproach on the profession than the wrangles, epithets, coarse and vulgar language sometimes indulged in by unworthy members of this noble profession toward each other or hostile witnesses in the progress of a trial. Bullying and browbeating witnesses, abusive language, and the manners and habits of the boor, are as much out of place in a temple of justice as in the church of God. These are neither necessary nor effective in cross-examination,—

the machinery of the law for exposing falsehood and establishing the truth. He is but a tyro who can not be severe without being abusive, eloquent without being personal, and forcible without being harsh. As has been well said: "It takes power to bend the bow, skill to aim the shaft, but the meanest malice can dip it in poison."

These are duties incident to the office of the member of the bar in the administration of law. When properly observed, their effect on others is important and far-reaching. It permeates society through the litigants, the witnesses, the juries, and the interested spectators, and inspires them with respect for the high functions of the judiciary. Good manners and respectful demeanor are contagious. The trial courts in our State are the only representatives of the sovereignty and power of the government with which the ordinary citizen is acquainted. He knows nothing of executive and legislative power. Few have seen the president of the United States, and comparatively few the governor. They have never felt his power, or if they have it has been at long intervals, when the militia or army has been called out to suppress riot. The legislature they perhaps know through their local member, whom they regard as their special friend and advocate. Their respect for the law as a refuge or a nemesis, the conservator of the peace or punisher of crime, comes into the daily lives of the people through the courts.

In our country we have disrobed our judiciary. No ermine, wig or bands; no insignia of office; no train of obsequious attendants appeal to the imagination of the populace and add reverence and respect for the persons of the administrators of justice. In our republican simplicity we must rely on the personality of the judge, the bearing of the members of the bar, and that inestimable force, the power of the aggregate people, vested in the judiciary, to inspire this confidence and respect. That members of the bar have influence in moulding this respect, is apparent to the most casual observer. Not only by their demeanor in court, but by their example as citizens, their conversation with friends, advice to clients, argument to juries, and in all public positions which their training, ability and influence award them in other relations of life. This influence always has been in the past, and will continue to be in the future, a most potent one in fixing the estimation of the judiciary in the minds of the people.

The pertinent inquiry presents itself: "Are we performing our whole duty in this regard?" I think not. It too often happens that our leading lawyers show impatience in the presence of the court, speak contemptuously of the judiciary to their clients when unsuccessful in their causes, and seek to excuse their own

negligence or incompetency by imputing improper motives or discrediting the learning of the judiciary. If the day ever comes when the people shall lose confidence in the integrity and justice of our courts of law and refuse to obey its mandates, when the administration of the law shall fall into disrepute, when property rights shall be disregarded, the guilty evade punishment and anarchy prevail, the members of the bar will themselves not be free from the responsibility.

These observations may seem trite, and a few years ago would perhaps have been open to the criticism that they were untimely and without occasion. There are few thoughtful lawyers, I believe, however, who have not observed with apprehension the disposition now largely prevalent among the populace to speak disrespectfully of all persons in authority. The most opprobrious epithets are used toward our president, governor, senators, members of congress, our Federal judiciary and even our State judiciary, both in the public prints and in addresses to the people, and the serious phase of it is that they are permitted to pass without challenge or rebuke.

Charges are made against their private and public character, which if true, would under the law condemn them to a felon's cell, and forever disqualify them from the exalted offices they hold. These charges are known by the more intelligent to be utterly without foundation in fact, but the tone of the public sentiment which arouses them and permits them to pass unrebuked is indicative of moral disease. It is demoralizing to the young and ignorant, and weakening to our form of government.

From the foundation of this government, in the formation of the colonies which composed it, yea, anterior to either, in all the great battles for civil liberty and sound government of the Anglo-Saxon race, the legal fraternity has belonged to the conservative class and insisted on the preservation of law and order. They were the architects of the Federal and State Constitutions, they have filled to a large extent the executive chairs, the legislative bodies and composed the judiciary. Their learning, ability and conservatism have given stability to the government, and their influence has been felt mostly for good. They have a noble past. Is their influence waning? If so, what is the cause of it? It comes from a lowering of the standards of the profession and prostitution of the office by dishonorable and unworthy members. The bar of Texas is to-day as able, as patriotic and more efficient than ever before in its history, but it needs weeding out and stricter discipline. The time is come when none of its duties as a citizen or officer of the court can be relaxed. The duty of selecting from the body of the profession a judiciary

which is to administer the laws for the next few years is now upon us. It will be largely controlled by members of the bar. Will they lay aside personal friendship, considerations of geographical position, the alluring and siren voice of political traders and convention manipulators and select a judiciary for the State of Texas so pure as to be impervious to the attacks of malice, so courageous as to be incorruptible alike to money influence or popular clamor, and so learned in the glorious principles of the law that their opinions will be cheerfully acquiesced in by the law-abiding citizens of the State and accepted by those learned in the law in all enlightened States and countries? Place them not under personal obligations, remove them from temptation and make the position the laudable object of every true lawyer's ambition. When selected, use every effort to add weight, dignity and respect for their office and judgments. Here at last is the security of the State. Here the people are ruled by their own chosen instruments without friction or compulsion. Any other method develops into despotism. Above all things encourage not those persons who when a judge decides against a supposed public interest, even though he be contemptuously dubbed a 2x4 Federal judge, impugn his motives and seek to arouse disrespect for his opinions. Enlightened public opinion is at last a great factor in our government. When the courts lose their support and become impotent, constitutional government is at an end. Organized government must and will be maintained, and instead of the judiciary the executive with his bayonets will be the dependence of the people for the preservation of social order, and the members of the bar will be lost as a factor in this government.

The man of war, the man of force, will take the place of the man of law.

If such a calamity should befall us let the members of the bar be free from guilt.

REPORT

OF

COMMITTEE ON DECEASED MEMBERS,

BY

HON. F. CHARLES HUME, CHAIRMAN.

To the President of the Texas Bar Association:

The men whose loss it is the sorrowful duty of this committee to report were among those foremost in the ranks of the profession.

W. B. BOTTS was born in Fredericksburg, Virginia, September 7, 1835, and died at Houston, Texas, March 7, 1894. He was graduated, with distinction, from the Virginia Military Institute about 1856, and came to Texas a few years prior to the commencement of the late war between the States. In 1857, he engaged in the practice of the law in the city of Houston, in partnership with A. S. Richardson. In 1860, he was married to Miss Mattie McIlhenny. In 1861, he left Texas for the scene of war in Virginia, in a company known as the Bayou City Guards, enlisted in Harris county and afterwards becoming part of the 5th Texas regiment, of that famous command organized in Virginia and known in history as Hood's Texas Brigade. He was first major, and later lieutenant-colonel of his regiment. Resuming the practice of law, he formed a partnership in 1866 with the late distinguished practitioner and judge, P. W. Gray, in the name of Gray & Botts. The firm acquired a large and lucrative practice, standing in the front rank of the profession, and known widely and favorably throughout the State.

A distinguished lawyer of the interior, James A. Baker, of

Huntsville, Texas, became associated with these gentlemen in 1872, and the firm became Gray, Botts & Baker. After the death of Judge Gray, the survivors admitted to their professional association, first, James A. Baker, Jr., and last R. S. Lovett, and at the date of Colonel Botts' death the firm name was, as it has since remained, Baker, Botts, Baker & Lovett.

Perhaps no legal firm has ever been better known and more highly esteemed in Texas than those referred to; and to the fame of each no member contributed more than did Colonel Botts.

The qualities of his professional equipment most conspicuous were the care of his investigations, the soundness of his judgment, the wisdom of his counsel. He shrank from personal conduct of cases in the trial courts, and the making of oral arguments, but was always relied on by his associates for suggestion and advice in the ever recurring situations of novelty and difficulty developed in the course of court trials

He was remarkable for the industry and earnestness of his devotion to the law. He was one of a distinguished line of lawyers. His father was of the profession, his brother defended John Brown, and a remote kinsman defended Aaron Burr.

It was in the family circle, however, that his life shone with peculiar loveliness and beauty. Blessed with wife and children worthy of his devotion, he passed in their company and dedicated to their happiness the golden hours of rest from professional labor, and no call could separate him from the communion of the evening fireside. Those who knew him best do not hesitate to ascribe his death to the loss of his cherished wife, whose body was committed to the grave only a brief space before he drew his last breath.

The concurrent testimony of those who knew him best is, that he was pure in life, just in thought and act, and charitable in speech.

L. N. WALTHALL was born in Pulaski, Alabama, March 14, 1822, and died at his home in San Antonio, Texas, February 22, 1894. In youth, he moved with his parents to Perry county, Alabama, and resided there until his graduation from the University of Alabama. Having prepared himself for the bar, he moved to Mobile and became associated in the practice of the law with Judge Dargan, afterwards Chief Justice of Alabama. Married at the age of 23, to his cousin, Miss M. E. Walthall, he settled in Perry county, Alabama, taking charge of and conducting large inherited farming interests, until 1856, when he became president of the Cahaba Railroad Company, in which service he remained until the war between the States transferred

him to the camps and fields of the Confederacy, where he discharged to its full measure the soldier's duty.

After the war, he lived three years in New Orleans, and then returned to his native State and to the practice of law. He became a citizen and lawyer of San Antonio in August, 1881, and continued until his death in the labors of the profession. He easily took rank with the leaders of the bar, both in his native and adopted State. A prominent trait of his character was fidelity to and veneration for law, human and divine, and he believed that liberty the noblest and purest which admitted and respected the lawful rights of others. Enjoying in an unusual degree the affection, respect and confidence of the profession, he was specially dear to its younger members. To them, upon need, he gave without stint the wealth of his learning and the benefit of his experience; and his daily walk and conversation were a constant inspiration to lofty endeavor and stainless life. He was the "Father of the Bar." The strength and fullness of his character, the courtliness of his manners, the serenity of his temperament, the tenderness of his affections, the generosity of his heart entitled him to that respectful and loving appellation.

The crowning beauty of his life lay in the charm and sweetness of his personal and domestic relations. That beauty can not be reflected in words.

In the fullness of years and usefulness, and attended by

> ". . . that which should accompany old age
> As honor, love, obedience, troops of friends,"

he passed peacefully to rest.

P. C. TUCKER was born in Vergennes, Vermont, February 14, 1826, and died in Washington, D. C., July 9, 1894. Bred to the bar with all the careful training required to master both common law and equity jurisprudence, and skilled in the distinctive learning and practice of the two systems, he was well prepared, upon his removal to Galveston, Texas, in November, 1852, to prosecute successfully the extended practice then begun, and thereafter maintained, until a few years before his death. For a long time he was associated in the practice with T. J. League, under the widely known firm name of Tucker & League. Their commercial practice was very large and lucrative; but Mr. Tucker's peculiar qualifications for the equity and admiralty practice inclined him most to the federal courts. In these special lines he found his greatest pleasure and fame. Like all men bred to the learning and practice of courts of chancery as distinctive from courts of law, he always retained special admiration for the equity practice, and set a value on the separate jurisdiction of

the chancellor scarcely comprehensible to those of us to whom education and training have not imparted a like partiality. Early enthused and impressed by the lofty and ancient mysteries of Masonry, he was a devoted Mason for a lifetime, and during quite a number of years next preceding his death, gave himself up to the promotion of the interests of that venerable order. The stroke of death found him busily engaged at the capital in the discharge of his high functions as Grand Commander of the Supreme Council (mother council of the world) of the thirty-third degree of the Ancient and Accepted Scottish Rite Freemasonry for the Southern jurisdiction of the United States; and on July 15, 1894, his body was solemnly laid away, after the impressive ceremonies accorded to those of his rank and character by brethren of the order.

As lawyers we may cheerfully and justly accord to him the tribute of which he was thought deserving by his brother-Masons: "His career was unsullied by blot or stain."

JAMES H. BURTS was born in Washington county, Tennessee, in 1832, and died in Austin, Texas, January 15, 1894. Liberally educated, he studied law and was admitted to the bar in his native State in 1854. Moving to Texas in 1857, he located at Lockhart, in Caldwell county, where he prosecuted the practice of the law with industry, ability and success until the secession of Texas from the Union, when, on September 18, 1861, he enlisted, for the defense of Texas and its sister Confederate States, in Company B, 26th Regiment Texas cavalry, then commanded by Colonel, subsequently Brig.-Gen. X. B. De Bray. Elected third lieutenant of his company in 1862, he was afterwards made, successively, second lieutenant, adjutant of the regiment, and adjutant of the brigade, then commanded by General De Bray. His fidelity and gallantry as a soldier were conspicuous. Seriously wounded in the battle of La Compt, below Alexandria, Louisiana, and undergoing great suffering, his ardor for duty reurned him to the field when he was barely strong enough for service.

His commander and companion in arms said of him: "He was a magnificent officer and soldier, ever ready for duty."

Remaining at his post until the war closed, he then returned to Lockhart and resumed the long suspended labors of the practicing lawyer. He was a member of the firm of Berry & Burts, composed of W. W. Berry and himself, and they enjoyed a large practice in that part of the State. In 1872 he sought a wider field of labor by locating in Austin, Texas, where he became connected with the well known law firm of Chandler, Carleton &

Robertson, and largely contributed to the dispatch of their extensive business. Upon the dissolution of the firm in 1874, he continued the practice on his own account. Appointed assistant attorney-general by Governor Ireland in 1882, he retained that office and discharged its duties with effective ability and zeal, for the full period of the governor's incumbency, resuming private practice at the close of his second term. He frequently served as special judge under appointments of different governors. One of the best known and most important cases adjudicated by him was that of R. B. Hubbard, governor, for the use of the State, against A. J. Ward et al., upon the contract of lease made by the State to Ward, Dewey & Co., of the Huntsville penitentiary. The Supreme Court affirmed the judgment of the trial court. (62 Texas, 559.)

Major Burts lived and died a bachelor; but in an eminent degree possessed the tastes and affections so characteristic of the married state when it is happiest—warm in friendship for his fellows; respectful and chivalrous to women; gentle and loving to children.

As a student he was untiring and faithful; as an advocate forcible and clear, eschewing mere declamation, yet equal to animated and pleasing effort; as a member of the bar, frank and courteous to the courts and his professional brethren; as a man and citizen upright, blameless, beloved by all.

A. M. JACKSON, JR., was born in Ripley, Mississippi, September 8th, 1853, and died in Austin, Texas, August 17th, 1894. At the early age of twenty years he was graduated from the Law School at Lebanon, Tennessee, and shortly thereafter returned to his home in Austin. He spent most of the next few years traveling in search of health, and trying to build up a constitution which was never very strong. His first law partner was Hon. Z. T. Fulmore, and the firm of Fulmore & Jackson was widely and extensively known. His next partnership was with his father, and under the firm name of Jackson & Jackson are reported the opinions of the Court of Appeals in the first twenty-seven volumes of reports. On the death of his father, which occurred July 11th, 1889, Mr. Jackson continued as reporter until January 31, 1891, when he resigned. Vol. 28 and part of Vol. 29 bear the name of A. M. Jackson, Jr., Reporter. After his resignation, Mr. Jackson devoted himself to the practice of his profession, and was recognized as one of the leading lawyers of Texas.

REPORT OF COMMITTEE ON DECEASED MEMBERS,—BY JAMES B. STUBBS, CHAIRMAN.

[Omitted from Proceedings of 1893.]

HON. JOHN HANCOCK died on July 19, 1893, at his home in Travis county. He was born in Jackson county, Alabama, on October 24, 1824, and was there admitted to the bar. He came to Texas in 1847 at a time when so many strong and ambitious minds were attracted to this State, and settled in Austin, where he formed a partnership with Hon. A. J. Hamilton, a name noted in Texas history. His capacity and integrity soon placed him at the front, and in 1851, when scarcely twenty-six years of age, he was elected Judge of the Second Judicial District, in which position his clear and vigorous intellect, high sense of justice and fidelity to duty, won him the esteem and honor of his people. Thorough, logical and independent, the judicial elements were happily blended in his mental and moral make-up.

In 1855 he resigned from the bench and formed a partnership with that other splendid practitioner, Hon. Charles S. West, and their lives seemed thenceforward to move on parallel lines, even to the close. This firm was perhaps the most prominent and widely known in the State for many years. Lawyers young and old, as they search the records of our Supreme Courts, note in case after case, and on page after page, the briefs and name of this noble union of two profoundly learned, and brilliantly equipped minds that left their memories on the jurisprudence of our State, and elevated all they touched. Hancock & West, names that will long be honored and loved as exemplars and exponents of all the best and highest in the practice of that science of which we are followers: The science of law, of the rules and relations of human duties and actions, of the up-building and maintenance of right and reason, and the prevention of wrong and injustice.

After Judge West became a member of the Supreme Court in 1883, Judge Hancock associated himself in the practice with General N. G. Shelley, of Austin.

But it was not alone as an eminent lawyer that he was known; he was a statesman, far-seeing, conservative and intrepid, and in this part of his career, his rugged strength of character and courageous convictions were most strongly developed and manifested. Not only was this true of his fearless frankness of speech, but of what many now believe to have been the soundest advice and the wisest understanding of the present and future of our country. His views he imparted to his people. He rendered faithful and honorable service in the halls of congress,

and had his utterances been heeded, many of the ills that bore so grievously upon our people in the dark days of reconstruction, would have been alleviated.

Like that other lofty spirit whose bold signature to the declaration of his country's independence, is the sign manual of the patriot sage the world over, *our* John Hancock was true, brave and every inch a man. However some may have differed from him, all respect and admire his unsurpassed courage, his broad grasp of affairs and his absolute sincerety.

JOHN JAMES HAGGERTY, was born in Polk county, Ga., December 7, 1844, and when ten years of age, removed with his father to Texas. His boyhood was spent in Caldwell and DeWitt counties.

When the war opened, he enlisted in Captain Darden's company, which was afterwards a part of Hood's famous brigade. His youth and courage very soon attracted the notice of General Hood, and he was appointed a courier upon his staff, which perilous post he filled with honor, until the battle of Gettysburg, where he was captured, and imprisoned for a year at Fortress Monroe. He, and twenty-five others escaped from prison, by dropping into the water on a dark stormy night, and swimming the river. Only eight of these were afterwards heard from. The rest were doubtless drowned. During the rest of the year he served with Shannon's scouts.

After the war, he attended school at Gonzales college for a year. The death of his father in 1867 compelled him to take charge of his business. In 1870, he moved to Bellville, Austin county, and after serving a short time as deputy county clerk, and deputy sheriff, he entered the law office of his brother-in-law, Hon. A. Chesley, and in the fall of 1872, he was admittted to the bar, and immediately formed a partnership with his preceptor, under the firm name of Chesley & Haggerty, which firm continued until his death at his home in Bellville on April 7, 1893.

He was among the foremost lawyers of that section. Hardly had he attained the full fruition of a life's harvest, before he was gathered to the bosom of mother earth by the silent reaper. In his practice, he illustrated the dignity and honor of our profession, as his was a high plane of thought and action. Success rendered him none the less the modest gentleman, the sincere friend, the upright and conscientious counsellor. Seeking no political preferment, he took active interest in public affairs, but devoted himself mainly to the law, deeming it worthy of his best energies.

JOHN D. TEMPLETON, on April 24, 1893, at Fort Worth, in the high noon of his manhood, passed from earth's tribunals and human judgment to the bar of eternal justice, at which his just and gentle soul submittted the record of an honorable and useful career among his fellowmen.

His early endeavors bore fruit in accuracy and completeness, which characterized his professional and official work. He won distinction by earnest effort and patient toil. As Attorney-General from 1882 to 1886, questions of great importance in our public polity were brought before the courts by him for adjudication, and the results almost uniformly vindicated the wisdom of his opinion and soundness of his judgment. He was unobtrusive, yet most kindly and genial. The gentler graces of his character were such as to constitute him a true gentleman, within the definition that has been accorded the word: "A knight whose armor is honor, whose weapon is courtesy." In all the relations of life, he bore himself so that the good he did lives after him.

Rules for the Courts of Texas.

ORDER OF COURT.

SUPREME COURT OF TEXAS,
IN SESSION AT AUSTIN, October 8, A. D. 1892.

It is ordered by the court that the following rules to regulate proceedings and expedite the dispatch of business in this court and the other courts to which they apply, made in exercise of the power conferred upon this court, be and the same are hereby adopted as rules and regulations for this court and said other courts; and that they go into effect and be observed from and after this date.

It is further ordered that the reporter of this court be requested to insert a copy of said rules in the eighty-fourth volume of Texas Reports, and that there also be published one thousand copies in pamphlet form.

RULES FOR THE SUPREME COURT.

1. Applications for writs of error from this court to the several Courts of Civil Appeals shall consist of a petition addressed to the court and accompanying transcript certified under the hand and seal of office of the clerk of the Court of Civil Appeals. The petition, in addition to the requisites prescribed in the statute, shall show that the applicant has made a motion for a rehearing in the Court of Civil Appeals, presenting distinctly all the points upon which a writ of error is asked, and that the motion has been overruled. The transcript, in addition to the conclusions of fact and law and opinion of the Court of Civil Appeals and of the judgment rendered and bond given in the trial court as required by the statute, shall also contain a copy of the judgment of the Court of Civil Appeals, together with a copy of the motion for a rehearing filed therein, and of the order overruling the same. The application shall be deposited with the clerk of this court.

2. The clerk of this court shall receive all applications for writs of error, and file the petition and accompanying transcript from the Court of Civil Appeals, and enter the case upon a docket kept for that purpose, known as the application docket. But he shall not be required to take the same from the postoffice

or an express office unless the postage or express charges, as the case may be, shall have been fully paid. The cases shall be numbered consecutively on the application docket and the number shall be placed upon the application. Upon filing the application the clerk shall immediately issue a notice under his hand and seal of office to the clerk of the court from which the writ of error is sought, that the application has been filed. After the receipt of such notice the clerk of the latter court shall withhold the mandate until advised of the disposition of the case, in this court, by the proper process.

3. The application, when filed in accordance with law, shall be deemed submitted to the court and ready for disposition, unless the applicant shall file with his petition a request for time in which to present a brief or written argument, in which case a period of time not exceeding ten days may be allowed him for that purpose. The applicant, should he so elect, may cite his authorities in his petition or may file a separate brief or argument.

4. Upon a refusal by this court of an application for a writ of error, the clerk of this court shall transmit, with the least practicable delay, to the clerk of the Court of Civil Appeals, to which the writ of error was sought to be sued out, a certified copy of the order of this court denying such application.

5. If the application be granted, the clerk shall issue a writ of error to the judges of the court, the judgment of which is sought to be revised, advising them that the writ of error has been granted and directing them to cause to be transmitted forthwith to this court the original transcript of the proceedings of the trial court, together with all briefs and arguments on file in the case; and the clerk shall also issue a citation to the defendant or defendants in error, or to his or their attorneys of record, notifying him or them that the writ of error has been granted, and of the date thereof, and to appear and defend the same. Said citation shall be returnable in ten days, and in the event it be not served the clerk shall issue other successive citations until due service is had. Service of the citation upon one attorney will be deemed service upon all parties represented by him. If no bond be required the citation and writ of error shall issue immediately upon the granting of the application. If a bond be required the writ shall issue upon receipt of the duly certified copy of the bond prescribed by the statute. Unless further time be allowed by special order of the court in the particular case, the certified copy must be filed in this court within ten days from the granting of the application. If the copy be not so filed, the application will be dismissed by the court of its own motion.

6. When service of the citation in error shall have been had,

and the original transcripts and briefs sent up to this court by the Court of Civil Appeals, it shall be the duty of the clerk to put the case upon the trial docket, and to mark upon the file the number of the case as shown upon such docket. Cases upon the trial docket shall be numbered consecutively in the order in which they are entered thereon.

7. Causes in this court will be regularly submitted on Thursday of each week, though a case may be set down for submission upon another day by the permission or direction of the court.

8. A case shall stand for submission upon the first regular day for the submission of causes, coming after the expiration of thirty days from the day on which the writ of error shall have issued; provided the citation in error shall have been served ten days before such submission day. If not so served then the case shall be subject to submission on the first regular submission day, which falls ten days after service of the citation.

9. Motions in a case not submitted will be heard on the day next preceding the submission day for such case; and the adverse party will be required to take notice of all motions filed in the cause on or before the Tuesday immediately preceding such submission day. Notice shall be given of all motions filed after that time.

10. The clerk shall keep a motion docket, upon which shall be entered every motion as soon as filed. The motions shall be numbered consecutively upon the docket, and its number shall be placed on the motion itself.

11. A party who elects to file in this court a brief, in addition to the brief filed in the Court of Civil Appeals, shall comply, as near as may be, with the rules prescribed for briefing causes in the latter court, and shall confine his briefs to the points raised in the motion for a rehearing and presented in the application for a writ of error.

12. When any Court of Civil Appeals shall certify to this court any question for determination, or shall send to this court any cause upon a certificate of dissent, either upon its own motion, or that of any party, the certificate, in either case, shall be accompanied by the briefs filed in the Court of Civil Appeals; and the clerk of this court shall, upon the receipt of the briefs, issue notices to the attorneys, whose names appear thereon, of the day on which the question, or cause, as the case may be, shall be set down for submission.

RULES FOR THE COURTS OF CIVIL APPEALS.

TRANSCRIPTS.

1. The clerks of the Courts of Civil Appeals shall receive the transcripts delivered and sent to them, and receipt for the same if required, but they shall not be required to take a transcript out of the postoffice, or an express office, unless the postage or charges thereon be fully paid.

2. The clerk shall indorse his filing upon the transcript, of the date of its reception, if it comes to his hands properly indorsed, showing who applied for it, and to whom it was delivered, if presented within ninety days from the time the appeal or writ of error is perfected. But if it comes to his hands after the said date, or not so properly indorsed, he shall, without filing it, make a memorandum upon it of the date of its reception, and keep it in his office, subject to the order of the person who sent it, or to the disposition of the court. Said transcript shall not be filed until a satisfactory showing has been made to the court for its not being properly indorsed, or for not being received by the clerk in proper time; and upon this being done, it may be ordered by the court to be filed, upon such terms as may be deemed proper, having respect to the rights of the opposite party.

3. Either party may file the transcript for which he has applied to the district clerk, and which has been delivered to him; both of which facts must appear on the transcript by the indorsement of the district clerk. If the indorsement shows that it was applied for by one party and delivered to the other, it must be shown by the indorsement of the clerk, or otherwise, to entitle it to be properly filed as the transcript of the party to whom it was delivered, and that it was delivered to one by the consent of the other, as each party has the sole right to the transcript which he applied for to be made out for him; and if it is so filed, without that fact being shown, the court may strike the case from the docket as improperly filed, upon its own inspection, or upon motion of the party to whom the transcript belonged.

4. If both parties file transcripts within the proper time—which they may do—and that of the appellant or plaintiff in error is properly made and indorsed, it shall be regarded by the court as the transcript of the record in the case, and the court will grant the appellee or defendant in error leave to withdraw that filed by him for his own use.

5. If but one party file his transcript in proper time, that shall be regarded as the transcript of the record in the case.

6. From the time when the transcript, properly made out and indorsed, is filed, it will cease to belong to either party, but will become a record of the court, subject to its control and disposition.

7. Transcripts in appeals from judgments in proceedings in *quo warranto* shall be filed in the Court of Civil Appeals within twenty days after appeal is perfected, and the first Tuesday following such twentieth day shall be the day for filing motions in such cases.

MOTIONS.

8. All motions relating to informalities in the manner of bringing a case into the court, shall be filed and entered by the clerk in the motion docket, on or before the Tuesday next before the day on which such case is subject to be called for submission, otherwise the ground of objection shall be considered as waived, if it can be waived by the party; such filing and docketing will be sufficient notice of the motion.

9. Motions to dismiss for want of jurisdiction to try the case, and for such defects as defeat the jurisdiction in the particular case, and cannot be waived, shall also be made, filed and docketed at said time, which filing and docketing shall be notice of the motion; *provided*, however, if made afterwards, they may be entertained by the court, after such notice to the opposite party as the court may deem proper to have been given under the circumstances.

10. Motions, made either to sustain or defeat the jurisdiction of the court, dependent on facts not apparent in the record and not *ex officio* known to the court, must be supported by affidavits or other satisfactory evidence.

11. Motions for *certiorari* to perfect the record shall also be made in the time required in Rule 8. They must be accompanied with a sworn statement showing a necessity for the same, unless the record shows it, the filing and docketing of which shall be notice of the same. If made afterwards, they will be entertained only upon such terms and upon such notice as the court may deem proper. Unless reason appear to vary the rule, the party applying, in all cases, will be taxed with the costs.

12. Motions made to postpone the case to a future day, or to continue it until the next term, unless consented to by the opposite party, shall be supported by sufficient cause, verified by affidavit, unless such sufficient cause is apparent to the court.

13. The motion docket will be called on Wednesday of each week, when the motions filed and docketed according to the preceding rules will be in order for submission, at the instance of either party; and if not submitted then, may be submitted at the regular call of the trial docket, unless sooner called up and disposed of.

14. The arguments of counsel upon all motions shall be confined to a brief explanation of the grounds in the motion, so as to make them intelligible to the court, with a reference to the statutes and decisions relating thereto, unless further argument is requested by the court.

15. The clerk, upon filing and docketing a motion, will indorse upon the motion its number and the number of the case to which it belongs, which shall also be entered in the motion docket, together with the attorney's name who makes the motion. Any opposition in the way of answer to said motion by the opposite party may be filed, and in like manner indorsed and noted in the motion docket, and the name of the attorney therein entered.

THE DOCKET.

16. The clerk, before the regular call of the trial docket, shall have the file number indorsed on each transcript. Where briefs have been filed in a case, the name of the attorney or attorneys signed to the brief shall be entered by the clerk on the trial docket, opposite the name of the appropriate party, and that shall indicate to the court who appears for such party in the cause.

17. The clerk shall not make such entry of an attorney's name until he shall have filed his briefs; but he shall permit any attorney who desires to make an appearance in the case before he files his briefs, or without filing them at all, to place his name, in his own handwriting, upon the trial docket, opposite the name of the party for whom he appears, and that shall be regarded by the court as having whatever effect is given to the mere appearance of a party to a case in court without brief filed.

18. The court will not enter upon the docket the names of attorneys in a case, but counsel desiring their names entered shall see that it is done under the foregoing rule before the case is called.

19. Counsel desiring to call the attention of the court to a case on the motion docket or trial docket, not then called in its regular order, must, before doing so, provide himself with the number of the case on the docket.

CALLING THE DOCKET.

20. The trial docket will be called in regular order, according to the filing of the cases as they stand thereon, commencing with the first of those that have not been previously submitted, but the court shall not be required to take the submission of a case until the business on hand will admit of a prompt disposition after the submission has been taken.

21. Upon the call of the trial docket for the submission of cases, either party may submit a cause if it appears to have been properly prepared for submission on his part, unless, for good cause, the court shall postpone the hearing to a further day, or by agreement of counsel to a future day of the term, which will not be done so as to interfere with the business of the court. This rule is subject to exceptional cases given a preference to under some law or rule of the court, and to the action of the court on motions for the postponement and continuance of causes.

PREPARING A CAUSE FOR SUBMISSION.

22. A cause will be properly prepared for submission only when a transcript of the record exhibits a cause prepared for appeal in accordance with the rules prescribed for the government of the district and county courts, and filed in the court under the rules, with briefs of one or of both the parties, in accordance with the rules for the government of the court.

23. Said record should contain an assignment of errors as required by the statute. If it does not, the court will not consider any error but one of law that may be apparent upon the record, if the judgment is one that could legally have been rendered in the lower court and affirmed in the appellate court.

24. The assignment of errors must distinctly specify the grounds of error relied on, and a ground of error not distinctly specified, in reference to that which is shown in the record, or not specified at all, shall be considered as waived, unless it be so fundamental as that the court would act upon it without an assignment of errors, as mentioned in Rule 23.

25. To be a distinct specification of error, it must point out that part of the proceedings contained in the record in which the error is complained of, in a particular manner, so as to identify it, whether it be the rulings of the court upon a motion, or upon any particular part of the pleadings, or upon the admission or the rejection of evidence, or upon any other matter relating to the cause or its trial, or the portion of the charge given or refused, the fact or facts in issue which the evidence was incompetent or insufficient to prove, the insufficiency of the verdict or finding of

the jury, if special, and the particular matter in which the judgment is erroneous or illegal, with such reasonable certainty as may be practicable, in a succinct and clear statement, considering the matter referred to.

26. Assignments of error which are expressed only in such general terms as that the court erred in its rulings upon the pleadings, when there are more than one, or in its charge when there are a number of charges, or the verdict is contrary to law, or to the charge of the court, and the like, without referring to and identifying the proceeding, will not be regarded by the court as a compliance with the statute requiring the grounds to be distinctly specified, and will be considered as a waiver of errors, the same as if no assignment of errors had been attempted to be filed.

27. In cases submitted to the judge upon the law and facts, the assignments of error shall be governed by the same rules as in other cases, and the party desiring to appeal should, as a predicate for specific assignments of errors, request the judge to state in writing the conclusions of fact found by him separately from the conclusions of law. And in agreed cases under the statute the foregoing rules as to assignments of error shall be complied with as far as practicable.

28. There will be no assignment of errors allowed in the Appellate Court when none has been filed in the lower court, unless by consent of parties.

BRIEFS.

29. The appellant or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on, in accordance with and confined to the distinct specifications of error (which assignments shall be copied in the brief) and to such fundamental errors of law as are apparent upon the record, each ground of error being separately presented under the proper assignment; and each assignment not so copied and accompanied with its appropriate propositions and statements, shall be regarded as abandoned.

30. The appellant or plaintiff in error, in preparing his brief, shall make a general and succinct statement of the nature and result of the suit, as an introduction, which may be omitted in an agreed case under the statute, and then each point under each one of the assignments relied on shall be stated in the shape of a proposition, unless the assignment is itself in the shape of a proposition to be maintained, and then it will be sufficient to copy the assignment.

31. To each one of said propositions there shall be subjoined

a brief statement in substance of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. This statement must be made faithfully, in reference to the whole of that which is in the record, having a bearing upon said proposition, upon the professional responsibility of the counsel who makes it, and without intermixing with it arguments, reasons, conclusions or inferences. But an argument bearing only on the propositions submitted may follow each statement.

32. The propositions, if more than one under one ground of the assignment, shall refer to it, and be stated separately.

33. In a proposition relating to the error of the court in overruling a motion for a new trial or to arrest the judgment, in which there are several grounds, the particular ground or grounds should be referred to with the appropriate explanation; and if the same grounds of error have been presented in other propositions, it will be unnecessary to repeat them.

34. In propositions relating to fundamental errors of law apparent upon the record, enough must be stated to make the error of law which pervades the case obviously apparent, without requiring the court to search through the record to find errors, which they will not do unless properly pointed out, if the judgment is one which the trial court is competent to render in such a case.

35. When the assignments of error are numerous, counsel should present propositions on those which are most important in the determination of the case, waiving those that can not control the result of the decision of this court—amongst which may be classed those involving questions of fact, wherein the evidence is so preponderating, or so conflicting, as that the court, under well established rules of decision, would not set aside the verdict of the jury or judgment of the court upon them.

36. There should be annexed to each proposition, with its statement, and at the end of it, a reference simply to the authorities relied on, if any, in support of it, in the following order, to-wit: The statutes and decisions of this State; the statutes and decisions of the United States, if they are applicable to the case; elementary authorities; other decisions in the American and English courts. In citing decisions, those most nearly in point should be cited first, and they should not, usually at least, be so numerous as to require a waste of time in their examination.

37. The brief of the parties, framed in accordance with these rules, must be signed by the party or his counsel; and if by counsel, it shall appear for and on behalf of what party, or parties,

by name, it is signed; and the copies thereof filed in the Appellate Court shall be plainly written or printed, and if it covers more than eight pages of foolscap, they shall be printed.

38. Such brief may be amended by a citation of additional authorities to the respective points or propositions made in it, which must be filed and notice of it given to the counsel for the opposite party, if in attendance, one day before the case is called. No other amendment to the brief shall be allowed by the court, unless it is or can be done without injustice or unreasonable inconvenience being thereby imposed on the other party.

39. The failure of appellant or plaintiff in error to file an assignment of errors and briefs in the lower court, and in the Appellate Court in the time and in the manner prescribed by law and by the rules, shall be ground for dismissing the appeal or writ of error for want of prosecution, by motion made by appellee or defendant in error, as other motions under Rule 8, unless good cause is shown why it was not done in the time and manner as prescribed, and that they have been filed at such time and under such circumstances as that the appellee or defendant in error has reasonably not suffered any material injury in the defense of the case in the Appellate Court. In deciding said motion, the court will give such direction to the case as will cause the least inconvenience or damage from such failure, so far as practicable.

40. When it shall be found that the rules prescribed for the preparation of a case for submission have been fully complied with by the appellant or plaintiff in error, the court will, in its discretion, regard this brief as a proper presentation of the case, without an examination of the record as contained in the transcript, and may found its decision thereon, unless the appellee or defendant in error shall, by the time of calling of the case, file in the Appellate Court copies of his brief, to be kept there with the transcript, containing his objections, succinctly and definitely, to the grounds of error as presented in the propositions of appellant or plaintiff in error in his brief, taking up each of them in order, and stating such other matters contained in the record, in the mode prescribed for appellant and plaintiff in error, as may sustain his objection to each; to which may be added propositions of his own, supported by like statements of what is in the record, so as to present his view of the case, citing the proceedings in the transcript, with the pages, when practicable, to which he refers in his statements.

41. Whatever of the statements of the appellant or plaintiff in error in his brief is not contested, will be considered as acquiesced in. To each of his said objections or proposition may be an-

nexed his authorities, cited in the order indicated for the brief of appellant or plaintiff in error.

42. When appellant or plaintiff in error has failed to prepare the case for submission, by the omission of what is required after bond or affidavit filed for appeal and for writ of error with citation served, the appellee or defendant in error, before the call of the case, may file in the Appellate Court a brief in the manner required of the appellant or plaintiff in error—except that his propositions will be shaped so as to show the correctness of the judgment—which the court may, in its discretion, regard as a correct presentation of the case, without examining the record further than to see that the judgment is one that can be affirmed upon the view of the case as presented by appellee or defendant in error. The appellee or defendant in error shall be entitled to the custody of the transcript after it is filed in the Appellate Court, for the purpose of preparing his brief.

43. The appellee or defendant in error may submit the record upon a suggestion of delay, upon making a brief statement of the character of the suit, the proceedings therein, and the judgment rendered, which will be required in every case of such submission when appellant or plaintiff in error has filed no brief. If this is done in a case properly prepared for submission by appellant or plaintiff in error, it will be considered an acquiescence in the statement of appellant or plaintiff in error, in his brief, as to the contents of the record, and as merely a denial of the legal consequences contended for by the appellant or plaintiff in error, unless the appellee or defendant in error shall also file a brief, as heretofore provided, which he may do. If the appellant or plaintiff in error has not prepared the case for submission, the record will be examined sufficiently to ascertain that it is or is not properly a delay case, and if found to be a plain case of delay, it will be acted on as such; but if not, it will be reversed or referred back for a brief, or brief and argument, on one or both sides, as may be directed. In deciding under this rule, where the case has not been prepared for submission by the appellant or plaintiff in error, the court will be required to look only to the substantial merits as they may appear in the record.

44. When affirmance is asked upon certificate filed, there need be nothing more than a request for affirmance, signed by the party or his counsel. It shall not be submitted sooner than one week after being filed, if the court should be in session that length of time. The appellee or defendant in error may be heard on a motion to dismiss the certificate, or on a motion to file the transcript of the record, or on a motion to set aside judgment rendered, as in other cases of rehearing.

DEFECTIVE BRIEF.

45. In all cases wherein the brief or briefs are found insufficient, either in a proper presentation of the facts or proceedings in the case, or in the reference to the authorities, so as to enable the court to decide the case, the court may set aside the submission and refer it back, with such orders for postponement, filing of briefs, reference to authorities, by one or both parties, and reargument, written or oral, as may be deemed proper. If, however, one party has fully complied with the rules, and has filed a satisfactory brief that will enable the court to decide the case, and the other party is in default, and has not filed a satisfactory brief in accordance with the rules, the court may, in its discretion, disregard the latter party's brief, as if not filed in the case, and act upon that alone which has been properly filed in accordance with the rules.

AGREEMENTS OF COUNSEL.

46. All agreements of parties or their counsel relating either to the merits or conduct of the case in the court, or in reference to a waiver of any of the requirements prescribed by the rules, looking to the proper preparation of an appeal or writ of error for a submission, shall be in writing, signed by the parties or their counsel, and filed with the transcript or be contained in it, and, to the extent that such agreement may vary the regular order of proceeding, shall be subject to such orders of the court as may be necessary to secure a proper preparation for a submission of the case.

ARGUMENTS OF COUNSEL.

47. When the case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor, may, upon the call of the case for submission, submit an argument to the court, either oral or plainly written or printed, which, if written or printed, may be left on file with the transcript, copies of which need not be furnished, unless printed.

48. The arguments must be upon the disputed points, whether of law or fact, in support of the propositions relied on, on one side, and objections and counter-propositions on the other, and it must be confined to them, avoiding any reference or comment upon positions taken in the trial court, or to other extraneous matters not involved in or pertaining to that which is found in the record.

49. In referring to statutes, that part directly bearing upon

or relevant to the position, should be read at the bar, or stated in the written or printed arguments; and in citing elementary books or decisions of courts, the principle should be stated, or so much should be read or stated, as bears directly on, or tends to maintain, the proposition for which it is cited in the brief.

50. After the case has been presented to the court by such explanation as may be necessary, each side may be allowed an hour in argument at the bar, with twenty minutes more in conclusion by the appellant; and, after being so presented, if the magnitude or importance of the case or the difficulty of the question seem to required it, a longer time may be allowed. Not more than two counsel on each side will be heard, except upon leave of the court.

51. If counsel for but one party has filed briefs, an argument by him may be allowed, conformably to the preceding rules, as nearly as practicable, under the direction of the court.

52. Counsel who argue a case at the bar will be expected to be able to answer questions propounded by the members of the court, relating to the matters contained in the record, and to the laws or authorities cited in the argument.

53. Should it be apparent, during the progress of the trial, or afterwards, that the case has not been properly prepared, as shown in the transcript, or properly presented in the brief or briefs, or that the law and authorities have not been properly cited, which will enable the court to decide the case, it may decline to receive the submission, or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case.

54. When a case has been properly prepared for submission, and a satisfactory oral argument has been made, the court will promptly announce its judgment, if practicable, at the next succeeding session of the court, and when deemed necessary, deliver a written opinion; if not then, at some time during the term of the court.

CUSTODY OF TRANSCRIPT.

55. Neither the transcript nor any of the papers in a case shall be withdrawn from the custody of the clerk, nor taken from his office or the court room, without a receipt left therefor.

56. Cases, after submission, are no longer under the control of the attorneys, and the clerk will not let the transcripts of such cases go out of his office, except on the order of one of the justices of the court.

57. Original papers sent up with the transcript by order of the trial court for the inspection of the Appellate Court, will be

retained in the office, and will not be allowed to go out of the custody of the clerk, except by order of one of the justices of the court, which order must be filed with the papers of the cause.

58. The clerk shall furnish the parties and counsel with an opportunity, when reasonably applied to for that purpose, to inspect the records, judgments, papers, opinions, books and dockets in his office in which they may be interested; but he shall not be required to permit copies thereof to be taken without his consent. He shall, upon tender of reasonable compensation, give certified copies of the records of his office.

59. The clerk shall be responsible for every transcript or other paper in a cause that is missing from his office, unless he can produce the receipt of an attorney for the same, or otherwise show, by satisfactory evidence, that some one took it from his custody or from the court room without his consent, or that said transcript had passed into the hands of one of the justices of the court, and had not been returned to his custody.

60. No attorney shall take, or suffer to be taken, any transcript or other paper for which he has receipted, out of the reach of the court, so that it can not be produced in court or in the clerk's office when it is needed.

61. The reporter shall have access to the minutes and judgments of the court, and shall have custody of the transcripts, briefs and opinions so long as may be necessary to discharge his duties as reporter.

62. In all cases in which appeals or writs of error are dismissed, the appellant, or party filing the transcript, without further leave of court, shall have the right to withdraw the transcript, unless it contains original papers belonging to an adverse party, in which event leave of court shall be had before such original papers are withdrawn.

REHEARING IN THE COURTS OF CIVIL APPEALS.

63. Motions for rehearing shall be made and conducted strictly in accordance with the statute, which describes the manner of this proceeding.

64. Where a Court of Civil Appeals adjourns for the term within less than fifteen days after the rendition of judgment, the issuance of the mandate shall, unless otherwise ordered, be withheld until the expiration of said period; and if, within that period, an application for rehearing shall be presented to the clerk of the court at that place, having indorsed thereon the order of any member of the court that it be filed, the issuance of mandate shall be further withheld to await the action of the court on said application.

RULES FOR THE COURT OF CRIMINAL APPEALS.

1. The clerks of the Court of Criminal Appeals shall be governed by the rules applicable to the clerks of the Courts of Civil Appeals, except where a different rule may be prescribed by statute.

2. The rules governing motions, arguments of counsel and applications for *certiorari* to complete the record as prescribed for the Courts of Civil Appeals, shall apply to the Court of Criminal Appeals.

RULES FOR THE DISTRICT AND COUNTY COURTS.

PLEADINGS.

1. The pleadings in the District and County Courts shall, as prescribed by statute, be by petition and answer.

2. Pleadings, with the exception of those presenting issues of law, must be a statement of facts, in contradistinction to a statement of evidence, of legal conclusions, and of arguments. Facts are adequately represented by terms and modes of expression wrought out by long judicial experience, perpetuated in books of forms, in law and equity, which, though not authoritatively requisite, may generally be adopted as safe guides in pleading. In case of a violation of this rule, to such an extent as to produce confusion, uncertainty and unnecessary length in pleading, the court may require the matter set up to be repleaded, so as to exclude the superfluous parts of it from the record.

THE PETITION.

3. The petition of plaintiff shall consist of an original petition, and such supplemental petitions as may be necessary in the course of pleading by the parties to the suit, to enable the plaintiff to state all the facts presenting his cause of action, and such other facts as may be required to rebut the facts that may be set up in the original and supplemental answers, as pleaded by the defendant. The original petition and the supplemental petitions shall be indorsed, so as to show their respective positions in the process of pleading, as "original petition," "plaintiff's first supplemental petition," "plaintiff's second supplemental petition," and so on, to be successively numbered, named and indorsed.

ORIGINAL PETITION.

4. The plaintiff, in the original petition, in addition to the names and residences of the parties and the relief sought, may

state all of his facts, so as to present together different combinations of facts, amounting to a cause or causes of action, as has been the usual practice, or he may state the cause or causes of action in several different counts, each within itself presenting a combination of facts, specifically amounting to a single cause of action, which, when so drawn, shall be numbered, so that an issue may be formed on each one by the answer.

PLAINTIFF'S SUPPLEMENTAL PETITION.

5. The plaintiff's supplemental petitions may contain exceptions, general denials and the allegations of new facts not before alleged by him, in reply to those which have been alleged by the defendant.

THE ANSWER.

6. The answer of defendant shall consist of an original answer, and such supplemental answers as may be necessary, in the course of pleading by the parties to the suit, to enable the defendant to state all of the exceptions and facts, presenting his defense, as contained in his original answer, or his cross-action, if one be set up in the original answer, and such other facts as may be required to rebut the facts that may be stated in the original and supplemental petitions, as pleaded by the plaintiff. The original answer and the supplemental answers shall be indorsed, so as to show their respective positions in the process of pleading, as "original answer," "defendant's first supplemental answer," "defendant's second supplemental answer," and so on, to be successively numbered, named and indorsed.

ORIGINAL ANSWER.

7. The original answer may consist of pleas to the jurisdiction, in abatement, of privilege, or any other dilatory pleas; of exceptions, general and special; of general denial, and any other facts in defense by way of avoidance or estoppel, the same being pleaded in the due order of pleading, as required by statute; and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Facts in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

SUPPLEMENTAL ANSWERS.

8. The defendant's supplemental answers may contain exceptions, general denial, and the allegations of new facts, not before

alleged by him, in reply to that which has been alleged by the plaintiff.

9. The original petition, first supplemental petition, second supplemental petition, and every other, shall each be contained in one instrument of writing, and so with the original answer and each of the supplemental answers.

10. Each supplemental petition or answer, made by either party, shall be a response to the last preceding pleading by the other party, and shall not repeat the facts formerly pleaded further than is necessary as an introduction to that which is stated in the pleading then being drawn up. These instruments, to-wit: the original petition and its several supplements, and the original answer and its several supplements, shall, respectively, constitute separate and distinct parts of the pleadings of each party; and the position and identity, by number and name, with the indorsement of each instrument, shall be preserved throughout the pleadings of either party.

11. Each party who files a supplement of any number (as first, second, third and so on), shall give notice thereof by asking leave of the court, and filing the same amongst the papers of the cause, with the appropriate indorsement thereon, indicating its number and name.

AMENDMENT.

12. An amendment may be made by either party, upon leave of the court for that purpose, or in vacation, as prescribed by statute—the object of an amendment, as contradistinguished from a supplemental petition or answer, being to add something to, or withdraw something from, that which has been previously pleaded, so as to perfect that which is, or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment.

13. The party amending shall point out the instrument, with its date, sought to be amended, as "original petition," or "plaintiff's first supplemental petition," or others filed by the plaintiff, or as "original answer," or "defendant's first supplemental answer," or others filed by the defendant, and amend such instrument by preparing and filing a substitute therefor, entire and complete in itself, to be styled and endorsed, "amended original petition," or "amended first supplemental petition," or "amended original answer," or "amended first supplemental answer," and so on accordingly as said instruments of pleading are designated in Rules 3 and 6.

14. Unless the substituted instrument shall be set aside on ex-

ceptions for a departure in pleading, or on some other ground, the instrument for which it is substituted, shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

15. When either party may have occasion to plead new facts, additional to those formerly pleaded by him, which constitute an additional cause of action or defense permissible in the suit, he shall present it as an amendment to the original petition, or original answer (unless it is in its nature, a response to some pleading of the opposite party), by substitution, with the proper number, name and indorsement, in the same manner as other amendments.

16. When either supplement or amendment made to pleading is of such character, and is presented at such time as to take the opposite party by surprise (to be judged of by the court), it shall be cause for imposing the cost of the term upon, and charging the continuance of the cause (both or either) to the party causing the surprise, if the other party demand it, and shall make a satisfactory showing, or if it otherwise be apparent that he is not ready for trial, on account of said supplement or amendment being allowed to be filed by the court.

EXCEPTIONS TO PLEADING.

17. General exceptions shall point out the particular instrument in the pleadings, to-wit: the original petition or answer, or the respective supplements to either; and in passing upon such general exception every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency.

18. A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly the obscurity, inconsistency, duplicity, generality or other insufficiency in the allegations in the pleading objected to. The general expression that it is vague, uncertain, and the like, alone shall be regarded as no more than a general exception.

EXHIBITS IN PLEADING.

19. Notes, accounts, bonds, mortgages, records and all other written instruments, constituting, in whole or in part, the cause of action sued on, or the matter set up in defense, may be made a

part of the pleadings by copies thereof, or the originals, being attached and referred to as such, in aid and explanation of the allegations in the petition or answer made in reference to said instruments, but will not thereby relieve the pleader from making the proper allegations of which said exhibits may be the evidence, in whole or in part. No other instrument of writing, such as a deed, will, document, record of court, or agreement, which is not sued on as a cause of action by plaintiff, or set up as matter relied on in defense by defendant, but is designed to be used only as evidence of some fact that is alleged, shall be made an exhibit in the pleading; and when it shall be so attempted, by attaching such instrument and referring to it as such, the court will, of its own motion, or at the instance of a party, cause the instrument to be detached from the pleading, and adjudge it to constitute no part thereof, by an order of court entered of record, at the cost of the party violating this rule, so as to prevent the pleadings from being incumbered with that which is or may be only evidence in the case.

20. The office of a general denial by the defendant is to throw the burden of proof, as to the allegations denied, on the plaintiff. The defendant can not be permitted under this plea to introduce special matters in avoidance or estoppel, in evidence for his defense. And the same rule prevails when it is filed by plaintiff to facts in the cross-action or answer of defendant.

MOTIONS.

21. The clerk shall keep a motion docket in which all motions, when filed, shall be placed, with the names of the parties and counsel, with the date of filing and its number and the number of the case, which filing shall be considered notice of said motion before the continuance or final disposition of the case for the term, except where it is otherwise provided for by statute.

22. The court will set apart a particular day each week of the term, when the motions previously made, in which proper notice has been given, shall be determined, if urged, unless for good cause they are postponed to a day during the term, or continued by consent to the next term.

23. When notice shall be given of objections to the form or manner of taking and returning depositions, either party may require it to be put on the motion docket and tried as other motions; *provided*, if not tried sooner, it shall be decided before either party shall be required to announce readiness for trial on the facts.

DILATORY PLEAS, MOTIONS AND EXCEPTIONS, WHICH DO NOT GO TO THE MERITS OF THE CAUSE.

24. All dilatory pleas, and all motions and exceptions relating to a suit pending, which do not go to the merits of the case, shall be tried at the first term to which the attention of the court shall be called to the same, unless passed by agreement of parties with the consent of the court; and all such pleas and motions shall be first called and disposed of before the main issue on the merits is tried.

MOTIONS AND EXCEPTIONS TO MERITS.

25. All motions which go to the merits of the case, and all exceptions, general and special, which relate to the substance or to the form of the pleadings, shall be decided at the first term of the court, when the case is called in the regular order for trial on the docket, if reached, whether there be an announcement on the facts or not, unless passed by agreement of parties with the consent of the court.

CALL FOR TRIAL.

26. When the case is called for trial, the exceptions, if any remain undisposed of, shall be presented for determination, and shall then be decided before proceeding to the trial of the case on the facts, and if not presented, they shall be adjudged by the court to have been waived, and shall be so entered on the minutes of the court, the cost of filing to be taxed against the party filing them, and they shall constitute no part of the final record, unless some question be raised upon the action of the court in reference to them, and they are presented in a bill of exceptions.

27. When the exceptions have been presented and decided, leave may be granted to either or both parties to file an amendment in one instrument of writing separate from those which had been previously filed by each, which shall close the pleadings in the case to be then determined by the court, so as to decide all the questions of sufficiency arising upon them. In making this amendment, the party shall refer distinctly to such instrument as he desires to amend, by name and number, as in the other amendments, without repleading the whole of it, but shall succinctly state such additional facts to be added thereto as he may desire, and this amendment shall be styled and endorsed, "plaintiff's," or "defendant's trial amendment;" but if the case should not be then tried, the party or parties shall replead, as in other cases of amendment.

28. When the questions of law, if any, have been determined by the court, the judge may, before proceeding to trial, by the aid of the counsel, have the pleadings that have been held sufficient, or have not been excepted to, read over, if deemed necessary, and make a brief memorandum of the facts stated, or issue presented in the pleadings, and may read them out before the trial commences, so as to inform the parties of the view which is entertained by the judge of the matters of fact in issue as presented by their pleadings.

29. The court, when deemed necessary in any case, may order a repleader on the part of one or both of the parties, in order to make their pleadings substantially conform to the rules.

30. These rules of pleading shall apply equally, so far as it may be practicable to apply them, to intervenors and to parties, when more than one, who may plead separately.

TRIAL OF THE CASE.

31. The plaintiff shall have the right to open and conclude, both in adducing his evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant, or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff has a good cause of action as set forth in the petition, except so far as it may be defeated, in whole or in part, by the facts of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, when the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause.

32. The court shall not be required to allow a case to go to trial on the facts, when the pleadings are obviously so defective that a material issue has not been formed; and in such case the court shall call the attention of the parties to such immaterial or defective issue, so that the time of the court may not be wasted.

33. A party who abandons any part of his cause of action or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried, and he shall be taxed with the cost incurred upon such pleading so abandoned. He shall also be taxed with the cost incurred upon pleading, in support of which no evidence was offered, to be determined by the court on motion at the term of the trial, and not afterwards.

COUNSEL AND ARGUMENTS.

34. Counsel for plaintiff, or for defendant, when he holds the affirmative of the issue, shall have the right to open and conclude, but if he waives the right to open the argument, he shall not have the right to conclude. This rule will apply to motions, exceptions to evidence, and all other matters presented to the court, except in rules to show cause, in which the party called on shall begin and end his cause.

35. An application for first continuance shall not be argued.

36. In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his whole case as he relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

37. Counsel for an intervenor shall occupy the position in the argument assigned by the court, according to the nature of the claim.

38. Arguments on questions of law shall be addressed to the court, and counsel shall state the substance of the authorities referred to without reading more from books than may be necessary to verify the statement. On a question on motions, exceptions to the evidence and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

39. Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and, when indulged in, shall be promptly corrected as a contempt of court.

40. Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness, or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

41. The court will not be required to wait for objections to be made when the rules as to arguments are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

42. It shall be the duty of every counsel to address the court from his place at the bar, and, in addressing the court, to rise to

his feet; and, while engaged in the trial of a case, he shall remain at his place in the bar.

43. But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

44. No more than two counsel on each side shall be heard on any question or on the trial, except in important cases, and upon special leave of the court.

45. The attorney first employed shall be considered the leading counsel in the case, and, if present, shall have control in the management of the cause, unless a change is made by the party himself, to be entered of record.

46. An attorney of record is one who has appeared in the case, as evidenced by his name subscribed to the pleadings or to some agreement of the parties filed in the case; and he shall be considered to have continued as such attorney to the end of the suit in the trial court, unless there is something appearing to the contrary in the record.

47. No agreement between attorneys or parties touching any suit pending will be enforced, unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

48. Counsel of the party for whom a judgment is to be rendered, shall prepare the form of the judgment to be entered and submit it to the court.

49. Absence of counsel will be no good cause for continuance or postponement of the cause when called for trial, except to be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge, to be stated on the record.

50. No attorney, or other officer of the court, shall be surety in any cause pending in the court, except under special leave of court.

51. Any attorney who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading, presenting a state of case which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt; and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact.

52. After the court has pronounced its opinion upon a question made, no further argument will be heard; but if counsel think the court has fallen into error as to law or fact, they may submit a statement in writing, which the court will receive and consider.

BILLS OF EXCEPTION.

53. There shall be no bills of exceptions, taken to the judgments of the court, rendered upon those matters, which, at common law, constitute the record proper in the case, as the citation, petition, answer, and their supplements and amendments, and motions for new trial, or in arrest of judgment, and final judgment.

54. The charges of the court that are given, and those asked that are refused, when signed by the judge and filed by the clerk, being made thereby a part of the record by statute, should not, in civil causes, be made a part of a bill of exceptions.

55. The rulings of the court upon applications for continuance and for change of venue, and other incidental motions, and upon the admission or rejection of evidence, and upon other proceedings in the case not embraced in the two preceding rules, when sought to be complained of as erroneous, must be presented in a bill of exceptions, signed by the judge and filed by the clerk, or otherwise made according to the statute, and they will thereby become a part of the record of the cause, and not otherwise.

56. Exceptions to evidence, admitted over objections made to it on the trial, may be embraced in the statement of facts, in connection with the evidence objected to, provided the statement of facts be presented to the judge within the time allowed for presenting bills of exceptions, and be filed in term-time.

57. Exceptions to the admission of evidence on the trial, where no reason is assigned for objecting to it, shall not be sustained where the evidence is obviously competent and admissible, as tending to prove any of the facts put in issue in the pleadings; and in all cases the court, when deemed necessary, may call upon the party offering the evidence to explain the object of its admission, and also upon the party excepting, the reason of his objections, which, when done in either or both cases, may form a part of the bill of exceptions.

58. Exceptions to the admission of evidence, where the ground of objection is assigned, shall be considered in reference to the objection made to it, and the objection shall be stated in the bill of exceptions taken to its admission or exclusion.

59. Bills of exception must state enough of the evidence, or facts proved in the case, to make intelligible the ruling of the court excepted to in reference to the issue made by the pleadings.

60. When exceptions are made to the admission or exclusion of the evidence on the trial before the court or before the jury, the exceptions will be then decided, after such argument as the

court may allow, and a memorandum of the point ruled on will then be made by the judge, if the bills of exception are not then prepared and signed, which ordinarily should be done.

CHARGE OF THE COURT.

61. When the pleading of either or both parties contains several combinations of facts, either together or in several counts or pleas, each of which constitutes a cause of action or ground of defense, and is sufficiently supported by the evidence to require a charge, and upon which an issue has been formed, the charge should be so framed as to present to the jury and require a finding by them upon the issue made, upon each of said combinations of facts so contained in the pleadings, which may be necessary to a decision of the case.

62. When a full charge upon the issues has been made, so far as the evidence adduced tending to establish them may require, the court should not encourage the asking of additional charges covering the same ground substantially, and charges asked and not given should not be read in the hearing of the jury, or taken by the jury in their retirement.

JUDGMENT.

63. The entry of the judgment should carefully recite the finding of the jury, or the several findings, if more than one, upon which the judgment of the court is based.

64. The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.

65. Judgments rendered upon questions raised upon citations, pleadings and all other proceedings, constituting the record proper as known at common law, must be entered at the date of each term when pronounced.

66. A cause that has been submitted for trial to the judge on the law and facts shall be determined and judgment rendered therein during the term at which it has been submitted, and at least two days before the end of the term, if it has been tried and submitted one day before that time, unless it is continued after such submission for trial, by the consent of the parties placed on the record, and in such event a statement of facts and bills of exception shall be prepared and filed upon a request in writing by either party.

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

67. Each ground of a motion for a new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court,

charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designed to be complained of, in such way as that the point of objection can be clearly identified and understood by the court.

68. Grounds of objections couched in general terms—as that the court erred in its charge, and in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to the evidence, the verdict of the jury is contrary to law, and the like—shall not be considered by the court.

69. When the case is determined by the judge without a jury, counsel in making a motion for new trial shall specify succintly the supposed errors of law or fact, or both, into which the judge has fallen, as far as may be practicable to do so.

70. In motions for continuance, for the change of venue, and other preliminary motions made and filed in the progress of the cause, the rulings of the court thereon shall be considered as acquiesced in, unless presented in a bill of exceptions; and the rulings thereon shall be made a ground of objection in motions for new trial or in arrest of judgment, if they are desired to be relied on as grounds of error.

71. Motions for new trial and in arrest of judgment shall be determined on motion day of each week of the term, unless postponed to the next motion day, or, for good cause shown, to a subsequent day, and not later than two entire days before the adjournment of the court, at which time all such motions previously filed shall be determined.

THE STATEMENT OF FACTS.

72. Where the evidence adduced upon the trial of the cause is sufficient to establish a fact or facts alleged by either party, the testimony of witnesses, and the deeds, wills, records, or other written instruments, admitted as evidence, relating thereto, should not be stated or copied in detail into a statement of facts, but the facts thus established should be stated as facts proved in the case; *provided*, an instrument, such as a note or other contract, mortgage or deed of trust, that constitutes the cause of action, on which the petition, or answer, or cross-bill, or intervention is founded, may be copied once in the statement of facts.

73. When there is any reasonable doubt of the sufficiency of the evidence to constitute proof of any one fact under the preceding rule, there may then be inserted such of the testimony of the witnesses and written instruments, or parts thereof, as relate to such facts.

74. When it becomes necessary to insert in a statement of facts any instrument in writing, the same shall be copied into the statement of facts before it is signed by the judge, and instruments therein only referred to and directed to be copied shall not be deemed a part of the record.

75. Where there is no dispute about, or question made upon, the validity or correctness in the form of a deed, or its record, a will or its probate, record of a court, or any written instrument adduced in evidence, it should be described (and not copied), or its legal effect as evidence stated, as a fact established.

76. When questions are raised on such instruments as are mentioned in the preceding rules, only so much or such parts of them shall be copied into the statement of facts as may be necessary to present the question, and the balance of them shall only be described, or presented, as prescribed in the preceding rule.

77. The commissions, notices and interrogatories in depositions, adduced in evidence, shall in no case be inserted or copied into a statement of facts, but the evidence thus taken and admitted shall appear in the statement of facts, in the same manner as though the witness had been on the stand in giving his evidence, and not otherwise, in form or substance.

78. Neither the notes of a stenographer taken upon the trial, nor a copy thereof made at length, shall be filed as a statement of facts; but the statement made therefrom shall be condensed throughout in accordance with the spirit of the foregoing rules upon this subject.

CLERKS.

79. The clerks of the District and County Courts shall keep a court docket in a well-bound book, ruled into columns, in which they shall enter, in the *first* column, number of case and name of attorneys; *second*, names of the parties; *third*, nature of the action; *fourth*, the pleas; *fifth*, rulings of former terms; *sixth*, the motions and rulings of the present term.

80. The cases shall be placed on the docket as they are filed.

81. The clerk shall at each term make out two copies of this docket, one for the use of the court, and one for the use of the bar.

82. In preparing the court docket, it shall be the duty of the clerk to designate the suits by regular consecutive numbers, called *file numbers*, and he shall mark on each paper in every case, the file number of the cause.

83. In every case appealed to a Court of Civil Appeals, the clerk shall, in making up the docket at each succeeding term, keep the said cause in its proper place on the docket for disposition after being decided; and at the next term after issuing a writ

of error, the clerk shall replace the cause on the docket, with its riginal file number.

84. In making a complete record, as prescribed by statute, all e proceedings in the case shall be entered in the order of time which they occur; *provided*, amended pleadings shall take the ce of those for which they are substituted, and the pleading s superseded (except such as are specified in Rule 14), and e that are abandoned as shown by an order or judgment of court, shall be left out of the record.

TRANSCRIPT ON APPEAL OR WRIT OF ERROR.

In making a transcript, the proceedings shall be entered rder of time in which they occurred, as prescribed in the ceding rule, unless, with the approval of the judge, counsel on each side shall agree in writing, to be itself filed and copied in the transcript, directing the clerk which of the papers may be left out, as being useless in the decision of the case; *provided*, subpœnas shall not be inserted, nor shall the citations, in cases where the defendant or defendants have filed answers, unless some question is made upon them which will require them to be copied.

86. All bills of exceptions and statements of facts shall be literally transcribed; and the clerks are hereby prohibited from copying as parts of the same any instrument in writing, or document not originally inserted therein, but merely referred to and directed to be copied from some other paper in the case.

87. In copying the proceedings inserted in the transcript, there shall be a space left between them, so that each one can readily be distinguished.

88. On the left hand margin of the page of each proceeding the clerk shall note its name. and the date of its occurring or being filed. This may de dispensed with in printed transcripts; but in all cases the clerk shall copy, in connection with each paper filed, the file mark subscribed or indorsed thereon.

89. The pages shall be numbered at the bottom, on the left hand of each page.

90. The transcript may be either written or printed. If written, it shall be on good white paper, with black ink, in a plain, round hand, not confused by running words together or by flourishes, and with sufficient space between the lines to be easily read, and on one side only of each sheet of paper, with no sheets cut or mutilated, and the sheets shall be entire and filled with writing, so as to leave no blanks larger than the ordinary spaces left between the different proceedings to distinctly separate them;

and all the sheets upon which it is written shall be fastened together at the upper end with tape, ribbon, or something of the kind, and sealed over the tie with the seal of the court. When the transcript is printed it must be on both sides of the paper, in not less than small pica type, bound and paged in pamphlet form, of octavo size, and fastened at the back with the tie and seal of the court; but in other respects shall conform to the rules laid down for written transcripts.

91. The caption of the transcript shall be in the following form, to-wit:

"THE STATE OF TEXAS, }
"County of..... }

"At a term of the District [or County] Court, begun and holden at....., within and for the county of ....., before the Hon. ....., and ending on the ..... day of ....., A. D....., the following case came on for trial, to-wit:

"A. B., plaintiff,
v.
"C. D., defendant."

92. There shall be an index on the first pages preceding the caption, giving the name and page of each proceeding, including the name and page of each instrument in writing and agreement, and the testimony of each witness in the statement of facts, as it appears in the transcript. The index shall not be alphabetical, but shall conform to the order in which the proceedings appear as transcribed.

93. The transcript shall contain a bill of costs, regularly made out and copied.

94. It shall conclude with a certificate, under the seal of the court, that it contains a true copy of all the proceedings in the cause, and shall be dated and signed officially by the clerk.

95. The clerk, having made a transcript, upon the application of either party or his counsel, as prescribed in case of appeal, and in case of writ of error, as directed by law, shall deliver it to such party or his counsel, when so made out, on demand.

96. The notice of appeal and giving a bond on an appeal, and the filing of a petition and bond for writ of error, and the service of citations, will be regarded as an application to the clerk to prepare at once a transcript of the record for the appellant, or plaintiff in error, without further application.

97. The appellee, or defendant in error, or his counsel, to be entitled to a transcript of the record, shall specially make an application to the clerk to make it out for him.

98. The clerk, having prepared a transcript, shall endorse upon it as follows, to-wit:

"J. K., appellant, or plaintiff in error,
v.
"N. M., appellee, or defendant in error.
"From.....County."

And on delivery of it to the party, or to his counsel, who had applied for it, he shall in all cases indorse upon it, before it finally leaves his hands, as follows:

"Applied for by P. S. on the.....day of....., A. D....., and delivered to P. S. on the.....day of....., A. D.....," and shall sign his name officially thereto. The same indorsement shall be made on certificates for affirmance of the judgment.

99. Unless when specially directed by statute, the clerk of a trial court is not bound to transmit any transcript to a Court of Civil Appeals.

100. When the clerk shall have presented a transcript for examination to the party or his counsel who has applied for it, and it is found, in any particular whatever, to have been made out in violation of any of the preceding requirements, he shall be at liberty to return it as not being a complete and properly prepared transcript, in time for correction by the clerk. And the reception of it by the party or his counsel, without being so returned for such purpose, will be regarded as an assumption by him of all responsibility for any and all deficiencies found in the transcript, resulting from the violation of these rules or of the statutes.

ASSIGNMENT OF ERRORS.

101. The appellant or plaintiff in error shall file his assignments of error in the trial court as prescribed by statute; and the appellee or defendant in error may file cross-assignments with the clerk of the trial court when he files his brief, which assignments may be incorporated in his brief and need not be copied in the transcript. In such case one of the copies filed in the Courts of Civil Appeals shall contain a certificate of the clerk of the trial court showing that it is a copy of the brief filed in his office, and the date of its filing.

BRIEFS.

102. Appellant or plaintiff in error shall file a copy of his brief in the trial court as directed by statute, which shall be received by the clerk, and he shall indorse upon it his filing, with the date of its delivery to him, and keep it among the papers of

the cause, subject to inspection, in his office, by any of the parties or their counsel, and shall, upon request, deliver a certified copy of it, and of his filing, with its date; or if copies thereof shall be presented to him, he shall certify thereto for the party requesting it, but it shall not be copied in the transcript.

JURISDICTION OF THE DISTRICT COURT OVER APPEALS OR WRITS OF ERROR.

103. When there shall be no bond or affidavit filed, the appeal or writ of error shall be considered as abandoned.

104. When no transcript of the record, or no certificate for affirmance has been filed in a Court of Civil Appeals, at the term of the court to which the appeal or writ of error in which citation has been served is returnable, the appeal or writ of error shall be considered as abandoned, of which the certificate of the proper clerk of the Appellate Court, given at the end of said term, that no such case has been filed in said court, shall be *prima facie* evidence.

105. Rules for the government of the District and County Courts, heretofore made and published, shall be superseded from and after the time when these rules shall go into effect.

RULES OF THE DISTRICT COURT IN APPEALS IN ADMINISTRATION CASES FROM THE COUNTY COURT.

106. Motions to dismiss appeals shall be placed on the motion docket and determined as other motions.

107. Motions for *certiorari* to perfect the record shall be accompanied by a sworn statement, showing in what particular the transcript is defective, unless it shall sufficiently appear by the record itself. The cost of the motion and additional record, and of the term if it causes a continuance of the case, shall be taxed against the appellant, whose duty it is to have a correct record filed, at the discretion of the court.

108. In appeals from the County Court in cases pertaining to the estates of deceased persons, the transcript shall not contain anything which does not relate to the order, decision or judgment appealed from. Where the appeal has been taken by the same person from more than one order, decision or judgment entered of record in the same estate, at the same term of the County Court, all of the proceedings in each appeal being kept distinct, may be embraced in the same transcript.

RULES GOVERNING IN CRIMINAL CASES IN COUNTY AND DISTRCT COURTS.

109. The clerks of the District and County Courts shall record the proceedings had in their courts in the order of time in which they occur.

110. The record should show, and it should appear in the transcripts of the record for the Court of Criminal Appeals:

First. That the indictment was presented in open court, a quorum of the grand jury being present.

Second. That the defendant pleaded to the indictment, or that a plea was entered for him.

Third. In capital felonies, that the defendant was arraigned and pleaded, or that, upon his refusal to plead, a plea was entered by the court.

Fourth. That the jury trying the cause were impaneled and sworn according to law.

Fifth. That a final judgment was entered in the cause.

111. Transcripts of the record for the Court of Criminal Appeals shall not be encumbered with copies of capiases, bonds, recognizances, subpœnas, attachments for witnesses, or any of the proceedings had on a former trial, where a new trial has been granted, unless there is some question expressly raised on the trial, with reference to such proceedings, which requires revision in the Court of Criminal Appeals, or in *scire facias* cases, on appeal or writ of error.

112. In preparing transcripts the following order shall be observed, to-wit:

First. The index, which must refer to the proceedings in the order they appear in the record.

Second. The caption, which shall be as follows: "The State of Texas, county of..... At a term of the.....court, begun and holden within and for the county of.....at.....on the .....day of....., A. D. 18.., and which adjourned on the .....day of....., A. D. 18.., the Hon....., judge thereof, presiding, the following cause came on for trial, to-wit:

"No..... } *The State of Texas.*
v.
A. B....."

Third. The time and manner of the presentation of indictment.

Fourth. The indictment or information.

Fifth. The pleas of defendant.

Sixth. The verdict and judgment.

Seventh. The statement of facts.

Eighth. The charge of the court.

Ninth. The charges refused.

Tenth. Bills of exception.

Eleventh. Motion for new trial, and motion in arrest of judgment, and notice of appeal.

Twelfth. Such other pleas, motions and orders as are made during the trial of the cause.

Thirteenth. Final judgment [or in a misdemeanor case the recognizance or statement that defendant is in jail.]

Fourteenth. Assignment of errors, if any are filed, and request, if any, to send transcript to a branch of the court other than that to which the appeal is returnable.

Fifteenth. Certificate of the clerk, under the seal of the court, which shall certify that the transcript contains a true copy of all the proceedings had in the cause.

113. In preparing the transcript the following directions must also be observed. It shall be written on good paper, on one side only, in a neat, legible hand, free from erasures and interlineations, leaving a margin of sufficient width, in which margin the clerk shall note the name of each proceeding, and the time of its occurring or being filed, and at the left-hand lower corner, mark the number of each page. At the end of each paper must be copied the file marks indorsed thereon, and a space should be left between the record of each separate paper or proceeding.

114. The transcript must be fastened at the upper end with tape or ribbon, and sealed over the tie with the seal of the court, and folded and indorsed as follows:

"A. B., appellant,
v.
The State, appellee.
"From....county District Court [or County Court], A. D. 18.."

115. The statement of facts must contain a full and complete statement of all facts in evidence on the trial of the cause, including the copies of all papers, documents and exhibits adduced in evidence, also the proof of venue and identification of defendant.

116. The transcript of the record, where defendant has been convicted of a misdemeanor, must be delivered to the party appealing, or his counsel, but if not applied for before the twentieth day before the commencement of the term of the Court of Criminal Appeals to which the appeal is returnable, the clerk shall transmit the same by mail, paying the postage thereon, to the clerk of the Court of Criminal Appeals.

117. Transcripts of the record, where defendants have been convicted of a felony, shall be prepared within twenty days after the adjournment of the court, and sent by mail, postpaid, to the

clerk of the Court of Criminal Appeals, at the branch to which the appeal is returnable. But where the defendant or his counsel directs the transcript to be sent to a branch of the court where the term is held before the term to which the appeal is returnable by law, the clerk shall so transmit it, and send with such transcript a certified copy of such order or direction.

118. The clerk shall immediately after the adjournment of the court at which appeals in criminal cases are taken, make out a certificate under his seal of office, exhibiting a list of all such cases where the defendant has appealed. This certificate shall show the style of the cause upon the docket, the offense of which the defendant stands convicted, the day on which the judgment was rendered, and the day on which the appeal was taken, which list he shall transmit to the attorney general at Austin.

119. It shall be the duty of the district and county attorneys to see that the judgments in criminal cases are properly entered by the clerks, and, when practicable, they should be present when the minutes are read.

GENERAL RULES.

1. Any supposed violation of the rules prescribed in the conduct of a cause, to the prejudice of a party, may be reserved by bill of exception, presented as a ground for new trial, and assigned as error by the party who may conceive himself aggrieved by such supposed violation.

2. The foregoing rules shall go into effect and be of force in all the courts of the State, to which they are applicable, from and after this date (October 8, 1892); but shall not affect cases pending in the Supreme Court at the time of the organization of the Courts of Civil Appeals, which cases shall be controlled by the rules for the government of the Supreme Court at the time the appeals in such cases were perfected. Except as to such cases, all former rules are hereby superseded.

CLERK'S OFFICE, SUPREME COURT.

I, Charles S. Morse, clerk of the Supreme Court of Texas, hereby certify that the foregoing thirty-eight pages contain a true and correct copy of the rules this day adopted by this court, for the government of the courts of Texas, together with the order of said court putting said rules into immediate force and effect.

WITNESS MY HAND and the seal of said court this the 8th day of October, A. D. 1892.

[L.S.]

CHAS. S. MORSE, Clerk.

[Official reprint.]